# THE
# REPORTS
OF
# Edward Bulſtrode
Of the Inner Temple
# ESQUIRE,
His Highneſſe Chief Juſtice of
*NORTH-WALES.*

Of divers Reſolutions and Judgements, given with great advice, and Mature deliberation by the Grave, Reverend, and Learned Judges, and Sages of the
# LAW.

Of Caſes and Matters in Law: With the Reaſons and cauſes of their ſaid Reſolutions and Judgements, given in the Court of Kings Bench in the time of the late Reign of
*KING JAMES.*

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*Leges humanæ, non aliunde ſunt quam regulæ, quibus juſtitia edocetur; quia ubi nullus ordo, ibi ſempiternus horror inhabitat, & confuſio. Et ſicut per Nervos compago corporis ſolidatur, Sic per Legem——quæ à ligando dicitur, corpus hujuſmodi regni myſticum ligatur, & ſervatur in unum. Forteſcue fo. 10. 11.*

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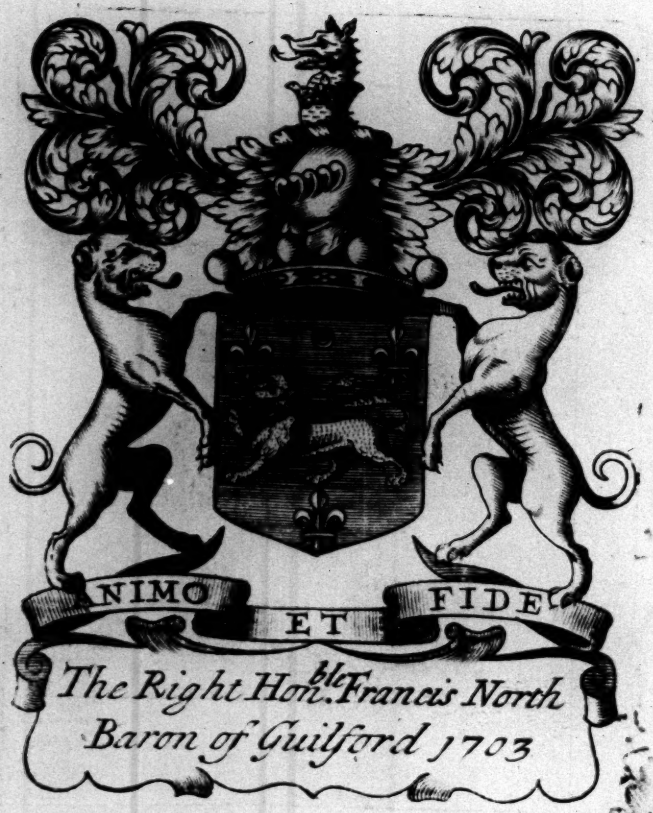

To the Right Honourable

Sir *BULSTRODE WHITLOCKE*

# KNIGHT,

*One of the Lords Commissioners of his*

HIGHNESSE TREASURY.

RIGHT HONOURABLE,

THere is no desire more naturall, then that of Knowledge, we attempt alwaies to bring us to it, the desire of it being the end and aime of all Studies, in any Science whatsoever, and for the better guiding of our Knowledge aright, a learned Father, treating de Scientia, observeth, the desirous of Knowledge to be fivefold, two of which only are commendable. A first sort are those that desire Knowledge, eo fine tantum, ut sciant, & hæc est turpis curiositas. A second sort, are those that desire knowledge, eo fine tantum, ut sciantur ipsi, & hæc est turpis vanitas.

*A third ſort, are thoſe, that deſire knowledge*, eo fine tantum, ut ſcientiam ſuam vendant, & hæc eſt turpis quæſtus. *A fourth ſort, are thoſe that deſire knowledge*, eo fine tantum ut ædificent, aut ut cæteros inſtruant, & hæc eſt vera charitas. *The laſt ſort, are thoſe that deſire knowledge*, eo fine tantum, ut ædificentur ipſi, & hæc eſt vera prudentia. *It is well obſerved likewiſe by others, that Knowledge hath ſomewhat of the Serpent in it, and therefore where it enters into a man, it makes him ſwell, and this is* Scientia inflans, *being a curious kind of Knowledge, whereby a man is puffed up with Pride, and a ſelf conceipt, and ſuch was the Knowledge of King* Herod, *Acts* 12. *making an Oration to the people, and upon their acclamation, that it was the voice of God, and not of man, he aſſuming that to himſelf (for which he ought to have given God the glory) from whom all his abilities came, the Text ſaies*, è vermibus conſumptus eſt. *It was the obſervation of King* Solomon, *that he which increaſeth Knowledge, encreaſeth Anxiety, but yet that anxiety is mixed with much ſatisfaction, when the end of our knowledge, is to better, and inſtruct others, and when we ſhall worthily, and wiſely imploy our labours, and induſtry in the augmentation, and propagation of thoſe things which are for the good of the Common-wealth. And this is* Scientia ædificans, *or* diffuſa, *an extenſive Knowledge, deſirous to profit others, as well, as our ſelves. And this is that knowledge which is moſt fitt, and requiſite to be in a Profeſſor of the Common Laws of this Land. The Knowledge of which*

*Laws,*

*Laws, are moſt agreeable for all perſons, that live under the Government of them. The true underſtanding of them, being an excellent Defence, for every Gentleman, in relation to his particular Eſtate, though he do not practiſe them, and a great preſervative, to keep him from breaking them, ſince that* ignornatia juris non excuſat. *Now for the better knowledge of the Laws of this Land, and as a readier way for the attainment thereof, are thoſe Learned year Books, Grand Abridgements, and many Volumes of Reports now extant, for the uſe and benefit, of the profeſſors of the Law, the Knowledge whereof is not eaſily to be attained, it being* ars longa, ſed vita brevis, & labilis mem ria, *it is a ſtudy, that will take up a mans whole time, and all little enough, conſidering the vaſt Volumes, written of the Law, ſo that we of this profeſſion, may truly ſay,* maxima pars eorum quæ ſcimus, eſt minima pars eorum quæ neſcimus. Heraclites *ſpeaking in commendation of the Laws, ſaies,* Quod abſq, legibus nullo pacto poſſit civitas eſſe incolumis, ſed abſq; mœnibus poſſit: *and* Forteſcue *ſaith,* Lex eſt ſanctio ſancta, jubens honeſta, prohibens contraria, eſt regula Regni, quia regulat omnia in Regno. *It is the effect of Law, that man, is to man, as a God, and not as a Wolfe, and therefore* Ariſtotle *well obſerves,* Quod optimum animal homo, lege fruens, ſed peſſimum animal homo lege devians. *Now the end, and aime at which all laws ſhould Levell, is no other then this, that the people may live happily, the Inſtruments, and Sinews of all outward bleſſings, being good*

*Laws:*

*Laws. And truly my Lord, the Laws of this Land have all the eſſentiall properties, to make them good, for they are certaine in themſelves; juſt in their Precepts, and Profitable in their execution, and without a certainty, a Law cannot be juſt.* Si enim incertam vocem det tuba, quis ſe parabit ad bellum, *ſo if the Law gives an uncertain ſound, who ſhall prepare himſelf to obey. It is an excellent rule, that is the beſt Law, which gives leaſt liberty to the arbitrage of the Judge,* (*who is only to judge* ſecundum allegata, & probata) *and he is the beſt Judge, that takes leaſt liberty herein to himſelf, and certainly, our Laws give the leaſt arbitrary power to the Judge, and are the moſt advantagious, for thoſe people, that live under them, of any Laws in the World: and yet I cannot but confeſſe, that our Laws having continued for ſuch a long ſeries of time, may have received ſome kind of ruſt, which is fitt ſhould be filed of, and ſomething fitt to be taken away, that ſo our Laws may be reduced into a ſound, and ſolid body, by the Reformation of ſome things: and ſuch a Work cannot but in future times be reputed an Heroick, and noble Work, and the Authors thereof, may be deſervedly rankt in the number of the Founders, and Reſtorers of our Laws. The advancement of which Laws, nothing does more import, then then that the Authentique Writings of the Law be confin'd within moderate bounds: and the preſſe not ſo free (without ſome publike allowance) as of late years it hath been. And truly my Lord I muſt confeſſe, that the multiplicity of late Reports publiſhed, did much diſ-*

*courage*

*courage me in going on with this Work, it being my fear to have any of my own Collections come forth* in publicum, *to the publike view, and censure of others, being conscious of my own inabilities: but seeing it hath pleased God to blesse me in my labours, in the way of my Profession, and with many years observation, of the passages in the severall Courts of Justice; I having been severall times importuned by many of my Honourable good Friends, and in particular by your Lordship (whose very desires to me, were alwaies commands) to publish some of those Collections, which I had so carefully, and laboriously collected, sitting for many years together, at the Feet of those learned Gamaliels, and grave Judges, (of which your learned Father was not the least) in the Courts where I attended, (and principally in the then Court of Kings Bench.) I was at the last perswaded, and resolved with my self (though with very much difficulty) to yield thereunto, and faithfully to publish such of my Collections, as I thought fittest, and most usefull, with the severall reasons of the Resolutions of those learned Judges. And a principall reason, which did most of all induce me thereunto, was this, that I having seriously viewed, and perused the multiplicitie of Reports (of these late times, more then before) since those* Herculean *Labours, and many Volumes, of learned Reports, and Institutes, published by that Grave, and learned Chief Justice, Sir* Edward Coke, *who may well, and truly be stiled the Father of the* Law, *(never any before him having done the like) and whose memorie will never be forgotten. I say when,*

*I had reviewed theſe late, and flying Reports, (moſt of them being* incerti temporis, *and of late time publiſhed (not by the Authors themſelves, (who were well known to be profoundly Learned) nor yet by them, during their lives, fitted and prepared for the Preſſe) but after their deaths, thus publiſhed by others, yet not known by whom, having not named themſelves, and theſe Reports, not without many groſſe miſtakings in them. Whereby they do rather cheriſh then extinguiſh Law Suites; whereas thoſe Grave and Learned Men, whoſe Names they beare, did imploy their labours for the quieting and laying aſleep all controverſies, and Queſtions in the Law, and for the cutting off and leſſening Law Suites, which ſhould be the principal aim and intention of all ingenuous profeſſors of the Law, that we may not* conſeneſcere litibus. *The due conſideration of this, made me the more willing, now in my life time, (and ſo long as it ſhall pleaſe God to enable me) to publiſh the fitteſt and choyſeſt Caſes, out of thoſe Reports, which I have with no ſmall care, labour, and paines collected together. And now if theſe my Labours by the indulgency of your Lordſhips Favour be approved of, I ſhall then be encouraged to make a further progreſſe herein under your Lordſhips ſhelter. For I could not ſettle my thoughts upon any other then your Lordſhip, for the patronizing theſe my* primitiæ

la-

laborum, *from whom I have received very many (though undeserved) Favours, which I can never sufficiently acknowledge. Neither can I ever forget the great Obligations, which in my younger years I have received from that Grave and Learned Judge* Sir James Whitelock *your Lordships Father, who was as a Father unto me, and to whose Learning, Worth, and Merit, I cannot attribute too much, he being not only Learned in the Civill and Common Laws, but universally Learned in all kinds of Knowledge; so that I may truly say he was* Antistes literarum & sapientiæ, & non solum doctus, sed natus sapiens: *many and great parts (which were wont to be incompatible in others) being eminently united in him.*

*And now my Lord it is time for me to end (lest I should make the Porch too bigg for the House) and to begg your Lordships pardon, for sheltring these my weak labours under your Patronage, hoping your Lordship will with a favourable eye passe by the many imperfections therein; some slips may unhappily passe my Pen, and many mistakes may casually happen in the presse during my absence, which I have been since as carefull as I could to rectifie by an* Errata. *However I must humbly crave your Lordships pardon for whatsoever-*

*ſights you may find herein, and do ſubmit them to your Lordſhips and the Readers favourable cenſure, beſeeching your Lordſhips acceptance of this ſlender Work as an earneſt of a greater, and as a tender of that great reſpect and ſervice which is due to your Lordſhip: from*

my Lord

Your Lordſhips

moſt obedient Servant,

EDVVARD BULSTRODE.

TO

# TO THE
# READER.

*Courteous Reader,*

I Thought it a piece of Juſtice, I owe my ſelf, and a right I owe you, before you read theſe Reports, to vindicate my ſelf from an aſperſion that may otherwiſe lie upon me: and that in Relation to ſome Reports, lately publiſhed, and ſtiled by the name of the twelfth part of Sir *Edward Cokes* Reports, whereunto my name is ſubſcribed, by way of approbation: as if I had peruſed the Manuſcript, before it came to the Preſſe. I muſt confeſſe, the Book was brought to me, after it was fully Printed, and not before, with a deſire, that I would read, and peruſe it, and give the party that brought it, my judgement, whether I conceived they were the Collections of Sir *Edward Coke*: I did accordingly, carefully read, and

peruſe it, but found therein ſo many groſſe miſtakes, omiſſions, miſprintings, and imperfections, that I told the Party that brought it, that it was not fit for publike view, with ſo many defects in it: but that I did conceive they were the Collections of Sir *Edward Coke*, and that there were many good and uſefull caſes in them: but never fitted nor prepared for the Preſſe: but notwithſtanding all this, they were Printed and publiſhed with all the defects, and miſtakes in them: and ſo it muſt needs fall out, when any one ſhall take upon him, to publiſh the private Notes, Collections, and Labours of another, after his death, being not fitted nor prepared for the Preſſe, by the Party himſelf in his life time: the ſame being only kept by him for his private uſe, (and as an *Indigeſta moles*) and not otherwiſe: and this I thought fitt to intimate to you, to prevent your miſconceit of me, and not to think I did prepare that Book for the Preſſe, the errors of which are ſo fatall, that it was not fitt ſo to be publiſhed: and now Courteous Reader, your favourable acceptation of theſe my firſt fruits, will be the greater encouragement for me to proceed further herein: all my ayme and deſire being that theſe my Labours may prove worthy your acceptation: many ſlips, defects, and imperfections, may unhappily, and unwillingly paſſe my Pen, in ſuch a Work, and many miſtakes may caſually happen in the

Preſſe,

Preſſe, all which I have been as carefull as I could, to rectifie by an Errata, at the end of my Book: and now although I have taken all the labour, yet I do unfainedly wiſh, much profit hereby to all the Readers: and ſo

Candide Lector vale.

# *The* NAMES *of the ſeverall* CASES *in this* BOOK *contained, and of the* TERMS, *and* YEARS *in which they were argued, and adjudged, with the number* ROLLS *entred.*

1. *Barwick* againſt *Foſter*, debt, Hil: 7. Jac: B.R fo: 1.
2. *Marſum* againſt *Hunter*, ejectment, Hill: 7. Jac: B.R. fo: 2. entred Trin. 7. Jac: B R Rot: 120
3 *Proctor* againſt *Johnſon*, error, Hil: 7. Jac: B R fo: 2
4 The Earl of *Shrewsbury* againſt the Earl of *Rutland*, error, Hill: 7. Jac: B R fo: 4. entred Paſch: 7. Jac: B R Rot: 610.
5 *Franklin* againſt *Green*, treſpaſſe, Hill: 7 Jac: B R fo: 11
6 *Haverley* againſt *Laighton*, error, Hill: 7 Jac: B R fo: 12. entred Paſch: 6. Jac. B R Rot: 601
7 *Glittings* againſt *Cooper*, ejectment, Hill. 7 Jac: B R fo: 13
8 *Stroude* againſt *Roper*, action on the caſe for a conſpiracy, Hill: 7 Jac: B. R. fo: 16: entred Trin: 7 Jac: B R Rot: 568
9 *Talby* againſt *Coke*, action caſe upon a promiſe, Hil. 7 Iac: B R fo: 16. entred Mich: 7. Jac: B R Rot: 540.
10 *Grimes* againſt *Peacock*, treſpaſſe, Hill: 7. Jac: B R 17
11 *Crews* againſt *Draper* in a Prohibition Paſch: 8 Jac: B R fo: 20
12 *Odell* againſt *Tirrell*, challenge of a juror, Paſch: Jac: B R fo: 21
13 *Evers* and *Strickland*, conſtruction of Letters Patents, Paſch: 8 Jac: B R fo: 21 entred Paſch: 7 Jac: B R Rot: 405
14 *Smith* againſt *Skipwith*, error, Paſch: 8 Jac: B R fo: 21 entred Hill: 7 Jac: B R Rot: 653
15 *Bartholmew* againſt *Savage* in debt, Paſch: 8 Jac: fo: 22 entred Hill: 7 Jac: B R Rot. 445
16 The Lord *Rich* againſt *Frank* in debt, Paſch: 8 Jac B R fo: 22. entred Hill: 7. Jac: B R Rot: 488
17 *Stone* againſt *March*, error, Trinity 8 Jac: B R fo: 24
18 *Yate* againſt *Roules*, Trin: Jac: B R fo 25. entred Hill: 7 Jac: B R Rot: 517
19 *Starkey* againſt *Pool*, error, Trin: 8 Jac: B R fo: 26. entred Hill: 7 Jac: B R Rot: 496
20 Sir *John Ratcliffe* againſt *Davis* in a trover and converſion, Trin: 8 Jac: B R fo: 29. entred Hill: 7 Jac. B R Rott: 1217
21 *Walter* againſt *Bould*, error, Trin: 8 Jac: B R fo: 31. entred Trin: 5 Jac: B R Rot: 922
22 *Haſtings* againſt *Beamount*, action upon the caſe for words, Trin: 8 Jac: B R fo: 36

23 *Foun.*

# The names of the ſeverall Caſes.


23 *Fountain* againſt *Grymes*, debt, Trin: 8 Jac: B R fo: 36. entred Mich: 7 Jac: B R Rot: 197

24 *Barker* againſt ——— error Trin: 8 Jac. B R fo. 37

25 *Lynker* againſt *Stanwell*, error, Trin: 8 Jac: B R fo: 37. entred Trin. 7 Jac: B R Rot: 1617

26 *Aſcot* againſt *Hender* and *Molſworth*, error, Trin. 8 Jac: B R fo. 37. entred Trin:7 Jac: B R Rot. 1113.

27 *Wolverton* againſt *Davis*, action of the caſe for a promiſe, Trin: 8 Iac: B R fol: 38. entred Trin. 7 Iac: B R Rot: 1196

28 *Dale* againſt *Copping*, action on the caſe for a promiſe, Trinity 8 Iac: B R fo. 39.

29 *Small* againſt *Hammon*, action on the caſe for words, Trinity 8 Iac: B R fo. 40.

30 *Cokaine* againſt *Goodlage*, debt, Trin. 8 Iac. B R fo. 40, entred Paſch. 8 Iac; B Rot. 204

31 *Baker* againſt *Jacob*, action on the caſe for a promiſe, Mich: 8 Iac. B R fo. 41.

32 *Eyliffe* againſt *Chopley*, ejectment, Mich: 8 Iac. B R fo. 42

33 *Weſtley* againſt *Brown*, debt, Mich. 8 Iac. B R fo. 43

34 *Luther* againſt *Sanders* in a *ſcire facias*, Mich: 8 Iac: B R fo. 43. entred Paſch: 8 Iac. B R Rot. 536

35 *Stone* againſt *Bliſſe*, debt, Mich: 8 Iac: B R fo. 43. entred Trin: 8 Iac: B R Rot: 1472

36 *Gabbe* againſt *Moſſe*, error, Mich: 8 Iac. B R fo. 44. entred Trin: 6. Iac: B R Rot: 191

37 *Smith* againſt *Jones*, action on the caſe for a promiſe, Mich: 8 Iac: B R fo. 44

38 *Lyſkerrits* caſe touching a *venire facias*, Mich: 8 Iac: B R fo. 46

39 The Biſhop of *London* and *Baldwine* againſt *Drew*, error, Mich: 8 Iac: B R fo. 47. entred Hill. 7 Iac: B R Rot: 502

40 *Pollard* againſt *Caſy*, treſpaſſe, Mich: 8 Iac: B R fo. 47

41 *Pompier* againſt *Chamberlaine* in a *Replevin*, Mich: 8 Iac: B R fo. 48. entred Hill: 7 Iac: B R Rot. 197

42 *Smith* againſt *Nuſam*, *debt*, Mich: 8 Iac: B R fo. 48. entred Paſch: 8 Iac: B R Rot. 146

43 *Hoblins* againſt *Kimble*, error, Mich: 8 Iac: B R fo. 49. entred Paſch: 3 Iac. B R Rot: 517

44 *Mills* againſt——— error, Mich: 8 Iac: B R fo. 50

45 *Brock* againſt *Beare*, treſpaſſe, Mich. 8 Iac: B R fo: 50. entred Hill. 7 Iac. B R Rot: 711

46 *Hewet* againſt *Norberow*, treſpaſſe, Mich: 8 Iac: B R fo. 52

47 The King againſt *Stafferton* and *Brown*, information upon a *Quo warranto*, Mich. 8 Iac: B R fo. 54

48 The Lord *Cavendiſh* againſt the Earl of *Shrewesbury*, error, Mich: 8 Iac: B R fo. 59

49 *Wood* againſt *Ingerſole*, ejectment, Mich: 8 Iac: B R fo. 61. entred Paſch: 7 Iac: B R Rot: 155

50 *Praunce* againſt *Tuckle*, treſpaſſe, Mich: 8 Iac. B R fo. 64. entred Paſch: 8, Iac: B R Rot: 138

51 *Simpſon* againſt *Clay*, treſpaſſe, Mich: 8 Iac: B R fo. 64. entred Paſch: 8 Iac. B R Rot. 27

52 *Burgeſſe* againſt *Standiſh*, error, Mich: 8 Iac: B R fo. 65. entred Paſch: 8. Iac: B R Rot. 640

53 *Tittleby* againſt *Adams*, error, Mich: 8 Iac. B R fo. 65.

# The names of the ſeverall Caſes.


54 *Neale* againſt *Sheffill*, debt, Mich: 8 Iac. B R ſo. 66. entred Trin. 8 Iac. B. R Rot. 742

55 *Limney* againſt *Hemmurſe*, error, Mich. 8 Iac. B R Rot. ſo. 67. entred Paſch: 8 Iac: B R Rot. 206

56 *Denton* againſt *Stock*, error, Mich: 8 Iac. B R ſo. 67

57 *Flewellin* and others againſt *Rave* in a trover and converſion, Mich: 8 Iac. B R ſo: 68

58 *Rowland Egerton* againſt *Morgan* and *Robinſon*, in an appeale, Mich: 8 Iac. B R ſo. 69

59 The King againſt *Morgan*, in an indictment, Mich: 8 Iac: B R ſo. 84 and ſo: 89 his pardon allowed

60 *Wolterton* and his Wife againſt *Day*, an Action upon the caſe for a promiſe, Mich: 8 Iac: B R ſo. 89. entred trin: 7 Iac: B R Rot: 1596

61 *Goldney* againſt *Curtiſe*, in an action of Covenant, Mich: 8 Iac. B R ſo. 90. entred Hill. 7 Iac: B R Rot: 864

62 Doctor *Ayrey* againſt Sir *Richard Lovelas* as touching an uſurpation, Mich: 8 Iac. B R ſo: 91

63 *Brickendell* againſt——— Action caſe upon a promiſe, Mich: 8 Iac. B R ſo. 91

64 *Moore* againſt *Brown*, ejectment, Mich. 8 Iac. B R ſo. 92

65 *Penruddock* and *Lanxfords* caſe, indictment, Mich: 8 Iac. B R ſo: 93

66 *Davis* againſt *Hales*, touching the manner of pleading, Mic: 8 Iac. B R. ſo. 93

67 *Dowglas* and others againſt *Kendall*, an Action of treſpaſſe, Mich. 8 Iac: B R ſo: 93. entred Mich 7 Iac. B R Rot. 356

68 The *King* and Sir *William Fitzwilliams* againſt *Ives*, indictment againſt a Purveyor, Hill: 8 Iac: B R ſo. 96

69 *Turpine* againſt *Forreyner* and others, in an Action of Treſpaſſe, Hill 8 Iac. B R ſo. 99

70 *Hawes* againſt *Loader*, debt, Hill: 8 Jac; B R ſo. 101

71 *Syliard* againſt ——— Replevin, Hill: 8 Jac: B R ſo: 101

72 *Barton* againſt *Sadock*, in an action of account, Hill: 8 Jac: B R ſo. 103. entred Paſch: 7 Jac: B R Rot: 416

73 *Hampton* againſt *Courtney*, error, Hill. 8 Jac. B R ſo. 107

74 The King againſt *Lemman*, an indictment, Paſch: 9 Jac. B R ſo. 109

75 *Tabbe* againſt *Matthew*, words, Paſch: 9 Jac. B R ſo. 109

76 *Scot* againſt *Scot*, debt, Paſch: 9 Jac. B R ſo. 110

77 *Baker* againſt *Dickinſon*, in a prohibition, Paſch: 9 Jac: B R ſo. 110

78 *Maynard* and his wife againſt *Towe*, an Action of Treſpaſſe, Paſch: 9 Jac. B R ſo. 110

79 *Shepheard* againſt *Woolſie*, an Action upon the caſe for a promiſe, Paſch: 9 Jac. B R ſo. 111. entred Paſch. 7 Jac. B R Rot. 100

80 *Stowe* againſt *Holland*, words, Paſch. 9 Jac. B R ſo. 112. entred Hill. 8. Jac. B R Rot.—

81 *Golley* againſt *Bacon*, a promiſe, Paſch: 9 Jac: B R ſo: 112

82 *Newman* againſt *Edmunds*, in ejectment. Paſch: 9 Jac. B R ſo: 113

83 *Hughes* againſt *Keymiſh*, in a ſpeciall action upon the caſe for ſtopping of lights, Paſch: 9 Jac. B R ſo. 115. entred Trin. 7 Jac. B R Rot. 1490

84 *Newall* againſt *Barnard*, an Action on the caſe for ſtopping of lights, Paſch. 9 Jac. B R ſo. 116. entred Paſch: 10 Jac: B R Rot: 597

85 *Mirrill* againſt *Nichols* in an Action of treſpaſſe, Paſhc: 9 Jac. B R ſo. 117

86 *Plat* againſt *Sleepe*, ejectment, Paſch: 9 Jac: B R ſo: 118

87 The Preſident, Fellows, and Scholars of *St. John's* Colledge in *Oxford*, againſt the Lord *Norris*, ejectment, Paſch. 9 Jac: B R ſo. 119

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AN

I have peruſed theſe Reports, and think fit they ſhall be printed for publick uſe.

*Novem.* 8. 1656. J. GLYNN.

OL. St. JOHNS.

I have peruſed divers Caſes in theſe Reports, and I think that they are fit to be publiſhed,

*Novem.* 10. 1656. MATTHEVV HALE.

# HILLARY TERM,

## 7 *Jac.* in the Kings Bench.

## *R. Barwicke* Plaintif. againſt *J. Foſter* Defendant.

In an Action of Debt for rent. The Caſe.

Richard Barwicke made a Leaſe of Land unto John Foſter for ten years, rendring 50l. Rent. Payable yearly by equal portions at two Feaſts in the year: That is to ſay, At the Feaſt of the Annuntiation, and S. Michael the Archangel, or within ten dayes after any of the ſaid Feaſts, within the ſaid Term. The Term expires. And for the arrerages of Rent, for the two laſt years, the Plaintiff brought his Action of Debt after the laſt ten dayes, counting of the Arrerages to be behinde, at the Feaſt of S. Michael laſt paſt; which was the laſt Feaſt, and the laſt day of the Term. *Et adhuc exiſtit arrero:* And upon the generall iſſue pleaded, A Verdict was found for the Plaintiff. The Defendant by his Counſel moved in Arreſt of Judgement, for that the Plaintiff counted for ſo much Rent due for two years at S. Mich. laſt paſt, Whereas no Rent was due until ten dayes after. As appears in the Declaration by the words of Reſervation, (for the laſt half years rent.) *Williams Juſtice*, the Plaintiffe is in this caſe without remedy for any part of his rent, by reaſon of the falſity in his Action. For if a man brings his action, for one thing to which he hath right: and for another thing alſo, to which he hath no right, his Writ ſhall abate for all, as appears by 9. H. 7. fo. 3. by Fineux. So in this caſe the Plaintif bringing his action for rent payable within ten dayes, which are out of the Term, and ſo no rent by force of the Reſervation, nor yet a rent within the word (yearly) and therefore the whole Writ ought to abate, and this laſt rent, being reſerved, and payable out of the Term, is no rent. Croke juſtice to the contrary, although the leaſe be ended at Michaelmas, yet the duty, as to the rent, remaines, by reaſon of the contract between them: and the ten dayes are only a libertie given to the Leſſee for his benefit. The which he cannot uſe to defeat the Leſſor of all his rent, and in an action of debt brought for the arrerages of ſuch a rent, where ten dayes time of payment are given, he is to ſay in his declaration pro duobus annis finitis at Michaelmas, and not finitis after the ten dayes, and where the rent is reſerved payable at Michaelmas, or within ten dayes after during the terme, he may demand the rent at Michaelmas, and the Leſſee ſhall not have the libertie of ten dayes for the laſt payment. Yelverton Juſtice and Flemming Chief Juſtice agreed herein cleerly, and that for this reaſon, becauſe, that this election, is an agreement made between the parties at the time of the Leaſe made, and when in ſuch a caſe that happens, ſo that no Election can be made, by this the agreement between the parties is gone,

Where the Writ ſhall abate and where not.

and determined, and when the term flows out, no election can then be for the ten dayes after the Term ended, for that by this Determination of the term, the Leſſors remedy by way of diſtreſſe, is gone, and therefore the contract ſhall be alſo determined, and this ſhall be veſted in the Leſſor preſently after Michaelmas, as a proper duty, & ſo his action well brought, according to the agreement between the parties grounded upon the contract, and by no intendement it can be otherwiſe conſtrued. For that according to the expreſſe agreement made between the parties, the rent reſerved ought to be paid during the Term. This caſe was ended by agreement between the parties, after they perceived which way the Court enclined in their opinions, the better opinion of the Court being clear for the Plaintif.

This caſe ended by agreement.

## *Thomas Marſum* Plaintif. againſt *Stephen Hunter* Defen.

In an Ejection. firm. entred, Trinit. 7. Jac. B.R. Rot. 120.

A Copiholder preſcribes to haue common of Paſture in the waſt of the Lord afterwards, he doth purchaſe the Inheritance in fee, and hath a Confirmation made unto him by the Lord, of the Houſe, and Land, and (to the which he had his Common) *Habendum* to him and his Heires *cum pertinentiis*. The queſtion was, whether the Common paſſed or not, or ſhould be extinct by the unity of poſſeſſion. It was argued at the Bar, that the Common ſhould be gone, for this reaſon. That if that thing to which it is appendant be gone, the thing appendant by this is alſo gone, according to the Books of 5. E. 4 fo. 8. The Caſe of Garter King of the Heralds, and 19. E. 3 Fiz. tit. Aſſiſe Plaint. 83. where an Aſſiſe was brought by a ſeme, and it was found by Verdict, that the Father of the Woman gave the Land unto the Defendant with his Daughter the Plaintiffe in Frankmarriage when they were *infra annos nubiles* both the one, and the other: afterwards at their full age, the Huſband ſueth a Divorce, and that at his ſuite, they were divorced, and that after the divorce he kept the poſſeſſion of the whole, and did put out the woman, for the which ſhe brought her Aſſiſe. And for that the cauſe of the guift, and the forme of it was determined and taken away by the divorce at the ſuite of the Huſband, it was adiudged that the Woman, being Plaintif ſhould recouer the whole. For that the Frankmarriage deſtroyed by the divorce, the title of the Huſband is alſo gone. And ſo in this caſe, the Coppyhold being deſtroyed, the Common alſo depending on this ſhall be likewiſe gone. Flemming chiefe iuſtice, the ſole point in this caſe reſts upon the preſcription, for in this caſe, he ought to ſay in pleading *Talis eſt conſuetudo*; but after the purchaſe he cannot ſay ſo, for the purchaſe doth extinguiſh the preſcription, and the Common being by preſcription which is gone, the Common alſo is gone. And in this agree Yelverton Juſtice. Williams Juſtice. A Coppyholder may intitle himſelf by pleading a *uſitatum fuit*: but when he himſelf, by his own act hath determined his eſtate, by this he hath loſt his Common. Yelverton and Croke iuſtices, did agree with him in this, for that the belonging here in this caſe is unto a cuſtomary eſtate, and not unto a Freehold, and theſe words here *cum pertinentiis* will not ſerue his turn, but if in the grant there had been theſe words (s) with all Commons, before uſed this had been then good, and ſufficient for him, and would have carried the Common, but not otherwiſe as here in this caſe it is, being without this clauſe, of all Commons before uſed. It was therefore ruled againſt him, by all the Judges; that he ſhould not by this new grant, have the Common of Paſture to him, and to his Heires: and by the rule of the Court Judgement was given againſt the Plaintif, that he ſhould not by this grant, have the Common of Paſture to him and his Heires.

Common extinct by unitie of poſſeſſion.

Judgement for the Defendant.

## *Procter* Plaintif. againſt *Johnſon* Defendant.

In a Writ of Error to reverſe a Judgement in the C.B. in debt upon a bond. The Caſe.

TWo Joyntenants for years of a Mill, the one of them grants his Eſtate, and dyes, the other ſuppoſing that all came to him by ſurvivorſhip, and as he took the Law to be, Grants, Bargains, and ſells the ſame to Johnſon, by the name, and words of *Molendinum ſuum* generally, and all his Eſtate, Right, Title, and intereſt

reſt in this, and doth alſo covenant by the ſame Indenture, to ſave and keep harmeleſſe, the vendee, from all former Acts done by him, or Diſturbances, and did alſo further binde himſelf in a Bond to perform all the former Articles, Grants, Covenants, and agreements in the ſame indenture between them contained. The Vendee being evicted out of part, brought his action of Debt upon the Bond in the C. B. and there it was adjudged for Johnſon the Plaintif, that the Action well lyeth. For the reverſing of which Judgement Procter brought his Writ of Error in the Kings Bench, the Writ of error was brought, for error in point of Judgement, without ſhewing of any particular error, but aſſigned the error generally, that Judgment was there given for the Plaintif, whereas the ſame ſhould have been given for the Defendant. And at the day aſſigned for the opening and arguing of the errors, the Councell for the Plaintif being abſent, Hitcham being of Counſell with the Defendant would have opened the point, and ſhewed the particular error pretended by the Plaintif; but the Judges would not ſuffer him, but ſaid, that if the Plaintif would not come with his Councell, and open the errors unto the Court, they would then proceed and affirm the Judgement afterwards. Yelverton at the bar, argued for the Plaintif in the Writ of error, that the Judgement given was erroneous & ought to be reverſed, for that the Bond was not forfeited. For that by his grant, nothing more paſſed, then what he had rightfully in him, to paſſe the words of the grant are *molendinum ſuum*, and all his eſtate in the ſame, the which generall word, *molendinū* is afterwards bounded & reſtrained, by theſe ſubſequent words, (& all his eſtate) neither had he any intent, to paſſe away more, then he had in him to paſſe, & all the words in the grant do paſſe *uno flatu* & to be conſtrued the one by the other Joyntenants as to the poſſeſſion of the thing in joynture are ſeiſed by entierties of the whole, & of every part thereof, equally, but in right, only of a moity, and by a grant of the whole, by one of them there doth only paſſe a moity, & by the covenant the firſt part is qualified by the latter, according unto Nokes Caſe, Coke 4 p. 1. fo. 80, 81. that a Covenant precedent in Law ſhall be qualified, by a Covenant in Deed ſubſequent. Sir Robert Hitchin argued on the contrary, for the Defendant in the writ of Error, and prayed affirmance of the former Judgement, for that the obligation was clearly forfeited, and that for two reaſons. First, becauſe of the generall grant, he having generally granted the Mill, by theſe words, *molendinum ſuum*, by which words, all the Mill doth paſſe, whereas he could not rightfully paſſe any more, then a Moitie thereof, neither doth any more paſſe in right, but a Moity, but in reſpect of his poſſeſſion in the whole, and of the generalty of his Grant, the which is to be taken ſtrongeſt againſt the Grantor, and for that he hath alſo bound himſelfe by his obligation to make good and perform this Grant, and in this he hath failed, and therefore being bound by his Obligation to perform the premiſes in the whole wherein he hath failed, and therefore his Obligation is forfeited for the whole. Secondly, the Obligation is forfeited for the whole, by reaſon of the expreſſe agreement between them, for if a man that hath not a term in point of right, will yet Covenant by his Indenture that another ſhall have the ſaid Term, and afterwards binds himſelf by Bond to perform all former Articles, Covenants, and Agreements between them, and cannot perform this, for he cannot grant that which he hath not in him for to grant, but by reaſon of his Covenant and Agreement, and his Bond to perform the ſame, his Obligation therefore is to be forfeited. Williams Juſtice: there is a paſſing in Right, and a paſſing in Poſſeſſion, and theſe are two ſeverall & diſtinct things: for where there are two Joyntenants, they are ſeiſed per my, et per tout: if one of them by deed indented, bargains and ſells *totum ſtatum ſuum*, and the other dies before inrolment, there paſſeth but a moity, in this caſe, *ex vi termini* the Obligation is forfeited, by the generall words in the firſt part of the Indenture, if the ſame be not remedied, and qualified by the ſubſequent words of the Covenant, wherein the difference will be this, where in the beginning, there are things, or rights in Law, to be paſſed, and where in deed, the firſt may be afterwards explained, by words ſubſequent, but not the other, as the word *dedi* implies a generall Warranty, but *dedi pro me & heredibus meis*, is a ſpeciall warranty with this limitation. Croke Juſtice; two Joyntenants be, the one grants all, which he hath by ſur-

dvorship (as he takes the Law, all passeth, for that his misiudging, or his mistaking of the Law, cannot alter his first Grant, these words, all his Estate cannot preiudice, nor any wayes diminish his first Grant, when as he before takes upon him to passe the whole, and so his Obligation forfeited: if these words had been in the Covenant to perform as much as in him was, there the first generall words, by the words subsequent, might be very well qualified, but here, by his generall Grant, and peremptory Covenant to perform this with a Bond by him entred into to perform the same. and herein failing, by this his Obligation is forfeited, and therefore the former Iudgement was well given, and to be affirmed. Yelverton Iustice, the Iudgement to be affirmed, his imagination cannot qualifie his Grant, the difference will be this, if a man grants a Manor which he hath not, he shall not be bound by this Grant, but by his expresse Covenant to perform this Grant, he shall be bound by this, in this case his Bond is forfeited. Fenner Iustice, to the contrary, the Grant here hath reference to that thing which may passe, and to no more, and the Covenant hath reference unto the Grant, and therefore nothing passeth, neither by the Grant, nor yet by the Covenant, but that, which he might well passe. For if there be two Coparceners of a Manor, the one Enfeoffes the other of the whole, there yet passeth but a moity, notwithstanding the Feoffment was made of the whole: so in this case here, he grants *molendinum suum*, that is as much as to say, so much of it as he could well passe by his Grant, and in which he hath right, and the Covenant and Bond shall extend no further, and so no forfeiture, and therefore the Iudgement given is erroneous and to be reuersed. Flemming Chief Iustice, As to the Covenant, which is, that he should continue in, freed, and discharged of all Incumbrances, by any one, and not, that he should have, and enioy, all his Estate which he had in the Will: but the Covenant is, that he would save him harmlesse: the Law, by any construction will not extend further, or beyond a limitation, by expresse Covenant, meeting with the same, as where Lessee for years grants his term, and Covenants that he shall enioy the same, notwithstanding any thing done by him, this is an expresse Covenant in this principall case, there is a grant of the whole, a Covenant to enioy, and a Bond for performance, the which by his not enioying of the whole is forfeited, the Iudgement well given, and to be affirmed. Croke, Williams, Yelverton Iustices, et Flemming Chiefe Iustice cleere of opinion, that the Obligation was forfeited, and the first iudgement well given, the difference between this case, and Nokes Case, Coke 4. pa. fo. 80. & 81. is in the manner of the performance, of the Originall agreement in this case, the whole Will, by the recitall, and by their agreement was conveyed, and the money paid accordingly for the whole, and but a moity passed, and he never enjoyed but the moity, and herein this case differs from Nokes case, here in this case the agreement was, to passe the whole Will, and bound by Bond to perform this agreement and hath failed herein, and so the Bond forfeited, and as to the other Covenants, touching the Incumbrances, as to this there is no difference between this case and Nokes Case, but in this case the breach is not laid, in the not performance of the Covenants, but the breach is here laid in the not performance of the Originall agreement between them, and the Bond for the performance of this agreement (being not performed) is therefore forfeited, and the Plaintif in the C. B. had good cause of Action, and so the Iudgement there well given, and to be affirmed, and accordingly, by foure Iudges against one, and by the Rule of the Court the Iudgement was affirmed.

Iudgment affirmed.

The Case in a Writ of Error to reverse a iudgement in an assise in the C. B. entred, pasch. 7. Jac. B.R. Rot. 610.

## The Earle of *Shrewsbury* Plaintif against the Earle of *Rutland* Defendant.

Queen Elizabeth being seised of the Manor and Park of Clypston alias Clepston, 10. Eliz. did grant by Letters Patents, *Officium custodis parci sui de* Clypston to Thomas Markham for his life, and did further grant unto him, *Herbagium, & pannagium* of the same Park for his life upon the death or Demise of Queen

Queen Elizabeth, the Manor with the reversion of the same Park, did descend and come unto King Iames, who 1. Iac. reciting Markhams Patent of the custody of the Park of Clypston by a new Patent, grants unto the Earle of Rutland for his life in reversion, *Officium custodis parci sui de Clypston alias Clepston*, to begin upon the death, surrender, or forfeiture of the Estate of Markham, and did thereby further grant unto him for life, *Herbagium, & pannagium parci prædicti. Habendum adeo plene, & integre*, as Markham had the same, afterwards King Iames grants the reversion of this in fee, both of the Manor and Park unto the Lord Mountioy, who granted the same in fee unto the Earl of Shrewsbury, 4. Iac. Markham died, after whose death Thomas Thorne entred into the Park as servant to the Earl of Rutland, and by his Commands, and upon a Reentry the Earle of Rutland brought his Assise in the C.B. and had Judgement there given to him for recover, and for reversing of this Judgement, the Earl of Shrewsbury brought his Writ of Error in B. R. and divers errors assigned to reverse the same Judgement, all which severall errors were argued by the Judges. Croke Iustice, the Judgement given in the C. B. is erroneous, and to be reuersed. The errours in the Judgement are 3. The 1. Error, That after the Verdict, and before Judgment, the Plaintif in the Assise did enter into the Park, and did there hunt and kill a Stag, and did take a shoulder of it for his fee, and that therefore his Writ ought to abate, this is no error nor any cause sufficient to hinder Judgement, neither did the Court erre herein in giving of their Judgement, and that for this reason, wherein this difference is to be observed between that which doth abate a Writ in Facto, and that by Plea, and where the same doth abate a Writ in facto, and that without any Plea, & therefore if a thing happens in facto, between the Verdict and the Judgement, as death, which *Omnia solvit*, Judgment given in such a case, with, or against any of the Parties, such a Judgement thus given is meerly *Vacuum*, and this without any other Plea, and such a thing shall abate a Writ in facto without any plea. But if a Feme sole brings an Assise, and after Verdict, and before Judgement, she takes a Husband, this is no cause for to hinder Judgement, for this cannot be avoided but by plea, and the partie hath no time to plead this between the Verdict and Judgement, and after Judgement the time is past for to plead it. So in this case, this entrie being a matter in facto, to abate the Writ, ought to be pleaded, but not between the Verdict and Judgement, for after Verdict the partie hath no day in Court to plead it, and after Judgement such a matter in facto cannot be alledged for error, but before, or not at all admitting of this difference, this entrie in manner as it was, (if he might have pleaded it) would not have abated the Writ, for here he did enter into the Park, and did there kill a Stag, and took one shoulder of it for his fee, in this case by his entrie he was a trespasser, & this did not abate his writ, but if he had entred, *ad custodiendum*, by such an entrie he had abated his Writ, for that by this he claimes a propertie, and he doth not here enter as an Officer, but as a wrong doer, and therefore this his entrie shall not abate his Writ. The 2. Error, being the great Question in this case, this makes me *hærere et hæsitare*, and this was upon the principall challenge disallowed, this is *novus casus*, and never before came in question, this is a principall challenge, to say, that between the Sheriffe who returns the Pannel, and one of the Defendants, there was an action of trespasse then depending, I rely not upon the principall challenge alledged to be, for that the Sherif was *quondam* servant to the Earl of Rutland, this is no principall challenge, for this is executed and past, but otherwise, if he were his servant at this time, and did weare his cloth, that in this case, the challenge, taken and disallowed by the Court, is a principall challenge, and this appears to be so by the Book of 11. H. 4. 60. 26. where the case was this in an Assise, that the Coroner, who returned the Pannel, had an Action of debt then depending against one of the parties, this is there held to be no principall challenge, otherwise it is in trespasse, or battery, for that a suit may be concerning *meum, & tuum*, and their friendship by this not infringed, it is there said if he be Plaintif in an action of Debt, this is no Principall Challenge, otherwise it is *vice versa* if he be Defendant, and this is our case directly, for here the Sherif

Termin. Pasch 8. Jac. B. R. les judges argued 1. Error.

Note the difference.

2. Error.

Sheriffe was Defendant, and therefore this is a good principall challenge in 21. E. 4. fo 12. this rule is there taken, that in every case where apparant malice doth appear to be in the one, or in the other, come en slaunder, this is a Principall Challenge. If an Action of battery, at the time of the return of the Pannel, be hanging, by, or against the Sheriffe, and one of the Parties, this is a principall challenge, and so it is of an Action of Slander, for these are angry Actions. *Et lex est recta & à Deo ordinata, directa ratione, & lex plus laudatur quando ratione probatur.* In this case, the Jury being returned by such a Minister as was not to return the same, nor to execute the same, for this cause the return is not good, and by consequence the Judgment given upon this Verdict is not good, but erroneous, and so to be reversed.

3. Error. The 3. Error, That Judgement was given for the Plaintiffe, whereas the same ought to have been given for the Defendant. This error resteth upon the validity of both the Patents, for *ex debili fundamento fallit opus*, both the Patents here are good, and the Earl of Rutland in his Assise might have made himself a good Title, as to the exception taken to Markhams Patent, that is to say, *recitando* the grant of Queen Elizabeth by Patent to Markham, in the next place it is said, *Et ulterius concessit* to him, *Herbagium et pannagium parci prædict.* and did not say, *per easdē literas patētes*, this grant notwithstanding was good, for *ex præcedētibus, et consequentibus* le grant appears to be good, and to make the same good, for there was therein a word Copulative, and relative, therefore this omission is not materiall, for by a necessary consequence, it shall have relation to the first Patent. As to the exception to the Patent granted to the Earl of Rutland, *recitādo* the grant of the King to the Earl of Rutland *per literas patentes (hic in curia prolatas)* for so he must say, grants to him *officium parci sui, &c. et ulterius* grants to him, *Herbagium & pannagium parci prædicta*, and doth not say, *quam cito vacare contigerit*, this omission is not materiall, for that *parci prædicti* shall have such a Relation, and Construction, as if the Grant had been, *modo, & forma prædicta*, and then without all doubt the same had been very good, and this shall be here supplied, for that *Literæ patentes Regis non erunt vacuæ*, if by any reasonable construction the same may be made good, and this is a Rule to be observed in the construction of Letters Patents, and this is but a captious exception, and in such cases, *Curiosa, & captiosa interpretatio, in lege reprobatur*, here the Patent is good, the Verdict, as it is found, is sufficient, and that which is by them omitted, shall be well supplied by reasonable intendment, for the *post mortem, &c.* is not materiall when the King rehearsing the first grant by Patent, and afterwards Grants the same thing by Patent to another, not saying therein *post mortem*, the Patent yet is good, and shall take his effect, *quando vacuerit*, for that the King is not in this case deceived in his Grant, and so to conclude the Patent is good, the Verdict sufficient, and this is no sufficient error to reverse the first Judgement; but the Court refusing to admit of a Principall Challenge, this is erroneous, and for this

1. error the Judgement ought to be reversed. Williams Iustice, First, as to the Grant made unto Markham, and the Omission in the same, the Patent is good by Relation to the first, and this is according to the common form of pleading, and this appears to be so by the Commentaries in the case of Mynes, and so it is in Greyndons Case there, and this is a sure form of pleading, and there is sufficient matter here found by the Jurie to supply all this, and no other intendment can be in this case, for when the Kings Grant cannot be construed unto a double intent, the same is then to be construed according to the intent and meaning of the King, and if to a double intent, then the same shall be void: and in this case the Jury may finde *Concessit*, or *non concessit*, this Grant to Markham is good, and he hath in both an estate for life. Secondly, the Grant made to the Earl of Rutland is good, and if it

2. had not been therein expressed to begin *post mortem Markham*, yet the same had been good, for that by a Legall construction it should be so intended by Law, after the recitall of Markhams Estate at the time of the second Grant, and the King is not here deceived in his Grant where the same cannot be by any Construction construes to enure, to a double intent, or upon a false suggestion of the Partie, neither

of

of these are in this case, and therefore the Grant is good, there being a convenient certaintie therein contained. Thirdly, as to the error assigned, being the refusall by the Court to allow of a principall challenge, the same being that at the time of the returning of the Pannell, there then was a Suit depending by one of the Parties against the Sheriffe, this is no principall Challenge, but where there is Kindred, Alliance continuing, or malice appearing between the Sheriffe and one of the Parties, this will be a principall challenge; but otherwise it is, where this is only by way of intendement, as in this case here, and therefore this is no principall challenge. Fourthly, As to the Entrie by the Plaintiffe in the Assise, into the Park, and there hunting and killing of a Stag, and taking a shoulder of the Stag for his fee, and this done by him after the Verdict and before Judgement, this entrie doth not abate his writ, and herein this difference is, where abateable, and where abated, as where death is pleaded, there the Writ is abated *in facto*, and this may be pleaded at any time when the partie pleaseth: so it is if a Feme Sole be Plaintiffe, and take a Husband, or if a Plaintiffe in an Assise be made Judge of Assise, hanging the same, this doth abate the same *in facto*. Fifthly, as to the matter of variance, being the Park of Clypston, *alias* Clepston, for this the Judgement is erroneous, for it cannot be intended to be all one, without an averment, as the case is, 12. Assis. fo. 33. Plan. 2. A Mannor called Anstie, in the Demand called Anestie, this not good without an Averrement, and so is the Book case in Hillary Term 42. E. 3. fo. 3. Plan. 12. a *Scire Facias* upon a Fine of Tenements in Esgrave, and the fine was of Tenements in Depgrave, and the Writ abated because no averrement, and so is Cookes Case, Coke 5. Pan. fo. 46. A Formedon brought of the Mannor de Issield in the County of Sussex, the Tenant Pleads in Barre a common recovery against the Donee in Taile of the said Manor, the parties are at issue upon no such record pleaded, and the Record was Iffield, there it was amended otherwise without an averrement it would have been Erroneous, and so in this case here without an averrement, it shall not be intended to be one and the same, and this being a materiall variance, and for this cause, there being no averrement, the Judgement is erroneous. Sixthly, as to the Seisin, and Disseisin, there is no Disseisin in the case, for without a Seisin there can be no Disseisin, for there was no Seisin of the Panage, and therefore the Judgement Erroneous, it is alleadged that he put in two Horses to take Seisin of the Herbage and Pannage, the which could not take any Seisin of the Pawnage. For as Lyndewood in his third Book, and in the Chapter *De decimis* fo. 101. B. Side defineth it, saith that *Pannaginm est pastus porcorum, in nemoribus, & in silvis, ut puta de glandibus, & aliis fructibus arborum, rum silvestrium, quarum fructus, aliter non solent colligi.* Mr. Skene in his Book *de verborum significatione* defines this to be a duty given to the King for the Pasturage of his Swine in his Forrest, and *pannaginm*, is also money taken for the Pawnage or the Pawnage it selfe, as appears by the Stat. of Charta de Forresta cap. 90. *unusque liber homo, &c.* and by Crompton in his Iurisdiction of Courts fo. 165. where he saith, that Pawnage is properly a certain summe of money which is taken in time of Pawnage for the feeding of his own Hogges in his proper Wood, through the Kings wood, if there be no other way, and by Hanwood in his Forrest Laws fo. 90. saith that Pawnage is the agistment of the mast of the trees, or the profit that is made of the same. And if he had in this case turned in his Hogges, this had been a good Seisin of both, both of the Herbage, and also of the Pawnage, for that they would both eat and grase, and a Seisin to maintain an Assise, ought to be of such a thing as is a sufficient Seisin in its proper nature, and if he be disturbed in the means to come unto this, this very disturbance is a Disseisin, and so farre these two last Causes, the Judgement is Erroneous, and to be reversed. Croke Iustice as touching the last point, the Seisin and Disseisin agrees in omnibus with Williams Iustice, that the judgement in this is erroneous and to be reversed. Yelverton Iustice, As to the first error, the entrie of the Plaintif after Verdict, and before Judgement, this is no error, and in this agrees with Croke and Williams, and whereas it was said at the Barre, that after Verdict the parties have no day in

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Court, to plead this, and to be therefore aided by a Writ of Error, this is not so, for they have a day in Court, and may well plead this before Judgement, or at the day adjourned, for to hear the judgement of the Court, but not to assign this, for error after Judgement, this being only matter Dilatory, so that he had day to have pleaded this after Adiournment, but not after Judgement, but admit he might plead this, yet this is no execution of his Office, for he ought to have alleadged a lawfull exercising of his Office, and this is not so, for he alleadgeth a killing, by which a forfeiture follows, and that which is done is a Tortious Act. As to the second 2. Point touching the challenge disallowed, this is no principall challenge, the Actions depending between the parties: the difference herein will be in the nature of the Actions, also the challenge is not good, if the Teste of the writ of trespasse hanging, were not before the other action brought, as in our case, before the assise in this principall case, this was no principall challenge, though the teste of the trespasse were before the Assise, for the trespasse here was for a trespasse done in one Town, and the Assise of Lands in another, and so diverse. A difference there will likewise be where the challenge is principall, and where the same is for favour, where it is a principall challenge, and not proved as consanguinity, this is not good, for that in every principall challenge, the matter alleadged without proof is not good, otherwise it is in a challenge for favor; for their demands shall be of the Jurors which are to trie the favour, whether he be indifferent for this cause, or for any other, this is sufficient also in any principall challenge. Issue shall be taken upon the matter alleadged, but never so, where the challenge is for favour, for there the Triors shall say, whether favourable or not, every Principall Challenge ought to be either confessed by the Partie, tried by the Triors, or judged by the Judges, the two former do faile in this case, the Judges are therefore to determine this, this is no principall challenge which was by the Court disallowed, and so no Error to reverse the Judgement. As to the third 3. Error, that Judgement was given for the Plaintif, where the same ought to have been given for the Defendant, which resteth upon the validity of the Patents, the Patents in this case are both good, as touching Recitals, in Letters Patents, this is to be observed, where the same is materiall, and where not, if the King grants lands in lease, which came unto him from a person attainted, this is good without any recitall, as if he Grants by Letters Patents, Lands of an Abbe, after the dissolution, but as touching the Generall learning of Recitals, in Letters Patents, see for this Coke 1. part. Alton Woods Case, if in the Kings Grant, there is a misrecitall in the date of the Patent, yet the Patent is good, but otherwise it is, if it be in the name where a recitall is of that which is not requisite, and this is false, this shall not make the Grant void, if in Letters Patents, the recitall is issuable, and it is found false, this shall make the Grant void, otherwise it is if the same be not issuable, there it is no wayes materiall, whether it be found true or false, this is a sure Ground for construction of Letters Patents, if the King Grants an Office for life, and reciting this Grant, Grants the same to another to begin presently, this Grant is void, but if after the Recitall he grants this unto another, without saying any more, there by a Legall construction he shall have it after the life of the other, if after such a recitall he Grants this to another by the name of a Reversion, this is a void Grant, for that the King then had no reversion in him to grant, but if the Grant be in the life of the particular Tenant, *habendum post mortem*, this Grant 4. is good. Fourthly, As to the Omission insisted upon the not saying *per easdem literas patentes*, this Grant is good notwithstanding, and in this agrees with Croke Iustice. As to the fifth Error touching the variance, Clipston, and Clepston, the 5. Judgement is good, notwithstanding this, and this no such a variance as shall make the Judgement Erroneous, for the same is all one, *idem sonant* and the same is all one, as Boson and Bozon *quatuordecem, & quatuordecim*, the same is all one, and so in this case it shall be intended to be all one, and the same thing, and this is no 6. such matteriall variance as to make the Judgement erroneous. Sixthly, as to the Seisin, and the Disseisin, there can be no Disseisin without a good Seisin, in this case, the putting in of the two Horses to depasture, is a good Seisin both of the Herbage

bage and also of the Pawnage, and so notwithstanding any of the Errors insisted upon, the Judgement is no wayes Erroneous, but *in omnibus* the same is to be affirmed. Fenner Iustice, 1. As to the first Error being the entrie after Verdict, and before Judgement; this cannot be pleaded after Verdict, *à fortiori* the same is not to bee assigned for Error after Judgement, the difference before taken is good, where by that which happens, the Writ is abated, and where abatable, as in case of death, for that *mors omnia solvit*, as this case is, this cannot be assigned for Error. 2. As to the Plaint, this is not sufficient, there being therein no allegation made, where the partie is, and this ought to have been certainly alledged, and in this the Judgement is erroneous. 3. The manner of the pleading is not good by reason of the Omission of prædicament for the Park, thereby to shew in what place it is, all this ought to have been alledged in certaine, the difference therefore will be between a Plea in Barre, and a Replication or Entitling a Plea in Barre, if good to a common intent it is sufficient, otherwise it is, where by way of intitleling, for this ought to be certainly set down in pleading. Also there is a Seisin and a Disseisin allowed, but there is no entrie mentioned to be made by him, the which ought to have been done, for when a man is to have an Office after the death of another who dieth before his entrie, the same is not so in him vested, as that he may have an Assise for the same, the which he cannot maintain, before an actuall entrie by him made. 5. As to the taking of Seisin with the Horses, this is a good Seisin, both of the Herbage, and also of the Pawnage, but the Plaintif hath well intitled himselfe to have this Assise. 6. As to the refusall of the challenge by the Court, makes the Judgement erroneous, be the challenge a principall challenge or not: for the Court, when this Challenge is offered to to them, they ought to have adjudged the same a principall challenge, or not, and then according to the form, an inquirie ought to be, whether the partie challenged be indifferent, or not: in this case the Sherif was no fit person to return the Pannell, the Judgement in this case is erroneous, and so to be reversed. Flemming cap. Justice. First, As to the entrie after Verdict and before Judgement, this was no abatement of his Writ, for that an entrie to abate a writ, ought to be an entrie into the thing demanded, or else it shall not abate the Writ, and this entrie ought to be with an intent to have the thing demanded, and that everie entrie will not abate the Demandants Writ, appeareth fully in the Assise of fresh force in Plowdens Commentaries fo. 92. the Parson of Honey-Lanes case, where the entrie was into the Cellar, hanging the assise, but this entrie was to view the antiquitie of the Cellar, and so did not abate the Writ, and there fo. 93. in a Formedon hanging before the Justices, the Tenant pleads in abatement of the Writ that the Demandant had entred, after the last continuance, and upon the evidence, it appeared, that there were many upon the ground cutting down of Wood, and the Demandant came upon the Land, and admonished them, at their perils to doe no more, then they could do by Law, and this was there adjudged to be no entrie to abate his writ, in this case, it is to be considered, whether his entrie was in the thing demanded, or not, and that with an intent to have the same, here is no such entrie in this case, to any such purpose the entrie here, being a tortious entrie, and not in execution of his office, in this case, he entred into the Park, and this was not the thing in demand, but the office, if in an Assise of Land, the Recognitors in the Assise praies the Demandant to come upon the Land, to direct them in the view thereof, and he comes so accordingly, and to shew them his evidence for the Land, this was held no entrie to abate his Writ, as appeareth in 26. the Book of Assises. Secondly, As to the second Point being the time of pleading of this entrie to abate the Writ, this entrie being after Verdict, and before Judgement, as to this, if the matter alledged for to abate the Writ, ought of necessitie to be pleaded, as here in this case it ought, he hath forreait his time, the same being past, and that by his own default, he cannot therefore now assigne the same for error, to reverse the Judgement, and as to the entrie and pleading of the same, where the same ought to be, and where not, see for this, the Book in

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3. Mich. 40 E. 3. fo. 42. Plan. 25. Thirdly, As to the matter of variance, the Assise is of Lands in Clipston, *alias* Clepston, this ought to have reference to have the Town, & as to the Obiection, that the Title is *de libero tenemento in Clipston*, et la plaint is, *de libero tenemento*, but saith not in Clipston, this is good, and no error, for the Land shall be intended to be in the same Countie where the action is brought, and the Town ought not in pleading to be twice alleadged in Assise, for that the Town is not here in controversie, but *liberum tenementum*. As to the variance, Clipston in the premises, and afterwards Clepston, this hath some probabilitie of variance, but is no Error, for it shall not be intended, but that the same was, one, and the same Park, but one is to be put in view, and the vocatum here is meerely void, and prædict is sufficient, and so the same is called in common speech. Fourthly, As to the title, the Grant made first to Markam for life, *et ulterius* grant, Herbagium, & Pannagium, this shall be intended *per easdem literas patentes*, as to this a Declaration, it is true, ought to have certaintie in it, but the same, not to be so, as to every intent, but if the same be certain to a Common intent, this is sufficient, for if in an *Ejectione firme*, the Declaration is, that such a one, demisit, generally, this is good for the Law presumes, that he hath a Title to make the Leale. Fifthly As to the challenge taken and refused, this was no principall challenge in 3. E. 4 fo. 12. in a reall Action, a Juror was there challenged, for that his Sonne had married with the Daughter of the Plaintiffe, this was there held to be no principall challenge, for that this did touch the parties, but ought to conclude, and so favourable, and so this is to be tryed, challenge for cause of actions, an Action brought for every debate, will not be the cause of a principall challenge, unlesse it be in such Actions, in which there is either Malice, Griefe, or Revenge, in such cases, this will be a principall challenge, but not otherwise, or if an Action be brought, in which the good name and fame of the partie is touched, this will be a principall challenge, but in this case now in question, this is no principall challenge. Sixthly, As to the Seisin and Disseisin of the Herbage and Pawnage is sufficiently alleadged, by the putting in of two Horses, also the Seisin doth not rest only in eating, or not eating, but the same is sufficient to make a claim by the entrie, and it is no strange thing for a Horse to eat Acrons, and admitting that they were chased out presently, before they could eat a mouthfull, yet this is a Disseisin clearly, and if they were put in on purpose, to make a claime, and to take Seisin, it is not materiall whether they did eat or not, but the intent will make this a sufficient Seisin of both the Herbage and pawnage also. Seventhly, As to the Recitals, they are good, but if Markam were dead, at the time of the recitall, then the Patent had been void, if there be a lease made by the crown, in this case upon a second grant a recital is necessarie, but not so in the case of a common person, if in case after a recitall, & before the second Patent taken, the first Patentee surrenders, if the King be not certified of this, before the taking of the second Patent notwithstanding the surrender, this second patent is void, for the King in this case is deceived in his grant, & so was it adjudged, 2. Eliz. in one Filpots case, where the thing granted by the King was extinguished by an Act of over, and the Patentee said that the same was in being, and did inform the King, and therefore the Patent was adiudged void, the King being deceived in his grant. *Concessio Regis* ought to containe certaintie, and therefore if the King grants unto one which hath Lands in divers Counties that he shall not be made Sheriff by these generall words, the grant is not good, for the uncertaintie of it, but if the grant be that he shall not be Sheriffe of any particular Countie, this Grant is good, having sufficient certaintie in it, for in the Kings grants certaintie is requisite, certaintie in the estate granted, and this not to be urged or wrested against the intent of the grant, as appeares by the case in 18. H. 8. Br. cases fo. 1. Eliz. 5. The King grants Lands to I. S. *et heredibus suis masculis*, this Title to be a void grant, because the King is deceived in his grant, for that this sounds in Fee simple, whereas the King intended an Estate Taile, also expresse limitation by the King in his Grant, or be it implyed by Law, this shall make the grant good, in this case here the King doth alleadge sufficient certaintie in the beginning of the grant,

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grant, for he hath recited that Markam, the first Grantee was then living, and so this is to have a Legall construction: and the Law saith that the second Patentee cannot have the fruit of his Grant, before the death of Markam, the first Patentee, so that here the Law makes a sufficient certainty, and there is no difference where the law doth expresse this, and where the partie, and so the Judgement, notwithstanding any thing objected to the contrary, was well given *in omnibus*, and no wayes erroneous, but ought to be affirmed. Note that at another time Serjeant Nicols moved the Judges to have their resolutions in this case, and further said, that in the entring of Judgements, the course is, that if the Judgement be affirmed, the entry then is, *quod affirmetur in omnibus*, but if the same be to be reversed, the entry then is to be *ob errores illos*, & to assigne which they were according to this is the Book in 1. Eliz. Dyer. fo. 168. Plan. 17. where in the end of the case, it is there said, Note the course in Banco Reg. that if any of the Errors assigned, are held for no error, they are then made void by a mark in the Roll, which is a crosse, and *Man secundari*, did then inform the Court, that this was their usuall course to marke this in the Judgement, with a Crosse, or Line, which is assigned for error, and is none, and the Sergeant informing the Court, said, that if in this case the Errors insisted upon, were singled out each by it selfe, and their opinions, as touching these Errors, in every one of the said Errors, there were three against two for the affirmance of the Judgement. Upon this the Judges then answered, and said unto him, that it was never seen, that any one at the Barre for the reversing, or affirming of any Judgement, after their Arguments, have used to single out the Opinions of the Judges in the severall Points, and to reherse their severall Opinions thus unto them, when they prayed to have their Resolutions in the case, this they ought not to do, but only after their Arguments to demand their Resolutions, and to attend the hearing of the same, without making any mention of their severall Opinions in their Arguments. But in this case, the Court being doubtfull which way the Judgement should be given, they all of them maintaining their severall Opinions, and in asmuch as at the Barre, they desired to have their resolutions. Flemming chief Iustice, the Court being full, did move them to deliver their severall Opinions, whether the Judgement should be reversed, or affirmed in generall. Croke, Williams, and Fenner Iustices, for the severall errors by them insisted upon, the Judgement is erroneous and ought to be reversed. Yelverton Iustice, et Flemming chiefe Iustice, the Judgement is not erroneous for any of the Errors assigned, but the same ought to be affirmed throughout, and so their being three against two for the reversall of the Judgement, and therefore by the Rule of the Court, Judgement was given, that the former Judgement should be reversed, and the reversall was accordingly pronounced, *quod nota bene* for that as to every Error singled out by it selfe, there were three Judges against two, for the affirming of the first Judgement, and overruling of every Error singled out, but yet upon the whole matter, as before the Judgement was reversed.

This was Termin. Trinit. 8. Jac. B R. Judgement reversed.

Judgement reversed.

## *Franklin* Plaint. against *Green* Defendant.

In an Action of Trespasse. The Case.

THe Corporation of Butchers in London was confirmed 3. Iac. by the which they had Power and Authoritie to them given, to make By-lawes, and Ordinances, they did afterwards ordain, that no Butcher, or person being a stranger, should sell any Veale within the Citie of London, unlesse they did dresse the Kidneyes of their Veales in such a manner as the Kidneyes of Sheep were dressed, and that if they did otherwise to forfeit for every time six pence, and if refused to pay the same, then to forfeit the Veale: the servant of the Plaintif coming with a Veale to sell, and not performing of the Ordinance, the Defendant in behalfe of the Corporation, took the Veale for his refusall to pay the forfeiture, and for this the Plaintif brought his Action of Trespasse, and demands the Judgement of the Court, the Defendant pleads in Barre, that he took the same as forfeited by their Ordinance, but doth not shew the Ordinance in certaine. Harris for the Defen-

By Lawes by the Corporation of Butchers in London.

dant, that the pleading is good without shewing of the Ordinance in certaine, being by way of barre, and a certaintie to a common intent, being by way of Barre is good. Stephens to the contrary, the Ordinance ought to be shewed specially in pleading, for that the same lieth properly in their own knowledge, also this Ordinance is not of any force to binde Forreners, neither can they distrain by vertue of this, because that they themselves are parties, and the other had no notice of this. Williams Iustice, of a private Ordinance made by the Butchers in their Corporation, a Stranger is not bound to take notice thereof, otherwise it is of an Act of Parliament; in this agrees Yelverton Iustice, and the Court as also that this by law was not good to binde Strangers, but the same had been good, if made for to suppresse Fraud, or any other Generall inconvenience, used by a Forreiner, as corruption or the like, in the sale of their Meat, and then they ought to take notice of the same, but not here as this case is, and so judgement was given in this case for the Plaintif.

Judgement for the Plaintiffe.

## *Haverley* Plaint against *Laighton* Defendant.

The Case In a Writ of Error to reverse a judgement in the C. B. in an action of the case upon a promise, Entred Pasch. 6. Jac. B. R. Rot. 60r.

Where notice is to be given, and where not.

HAverley did assume, and promise unto I. S. that if he did borrow of one Powell, 100. l. that he would repay this to him upon the same day, and on the same conditions that they between them should agree upon: I. S. borrowed the money, and agreed the same to be repaid at a day certaine, before the day I. S. dies, and makes Laighton his Executor, the day passeth, the money not paid, Powell brings his Action against Laighton and recovers, and Laighton as Executor of I. S. brings his Action of the Case upon a promise against Haverley, and had Judgement to recover against him in the C. B. upon which Judgement, Haverley brought his Writ of Error in B. R. and assignes for error, that no notice was alleadged to be given unto him before the day, what agreement was made between them, and without notice thereof given, he was not bound by his promise, to perform the said agreement: against the giving of notice, it was urged, that where the first Act to be done, ariseth on the part of the Plaintif, and this is secret and unknown to the Defendant, in this case notice ought to be given, but otherwise it is, where both parties are with this acquainted, no notice is to be given, where it is in case of an Obligation between the Parties, and so in case of an expresse Assumpsit: if a man be bound to pay I. S. 100. l. when he comes to Rome, he ought to take notice of this at his perill. Williams Iustice, in this case notice ought to have been given to the Defendant of the agreement, and day of payment, for want of which, the Declaration was bad, and defective, and so for this Omission, the Judgement erroneous, the difference will be where the thing is executed, and where the same is executory, where executed, there no notice to be given, but otherwise where the same is executory, and so is the case in 4. H. 7. what Cloth you shall deliver to I. S. I will see you paid for it, Ruled, that here notice ought to be given what Cloth was delivered to I. S. in this principall case, it was impossible for the partie to take notice of the quantitie of the summe borrowed, and of their secret agreements, and therefore for want of notice the Declaration was nought, and the Judgement erroneous, and the Plaintif in this principall case, could not have an Action upon the case for the promise, without giving of notice, for that notice here is the ground of the Action, and the not giving of notice, goes in barre of the Action, and without an Action brought he could not recover, and for this cause the Judgement was erroneous, and to be reversed. Croke & Yelverton Iustices, agrees with Williams Iustice in this, and with this difference where it rests in the equall knowledge of the parties, and where not, where in their equall knowledge, there no notice ought to be given, but otherwise if *è contra*, if the same be not in their equall knowledge, there notice is to be given, and so it ought to have been given in this principall case. Flemming chiefe Iustice to the contrary, as the giving of notice, this difference is to be observed, where a penaltie is to be reco-

recovered, there notice is requiſite to be given, but where damages are only to be recovered, there no notice is to be given, as in a Bond, where notice is part of the Action. In an Action of the caſe upon a promiſe, he is only to recover dammages, and the partie hath ſufficient notice given him by the Declaration againſt him, if notice here had been given to him, he ſhould then have paid the principall, with the damages alſo, but here there was no notice given, the partie is not for want of notice, diſcharged of his promiſe, for he ſhall pay the principall, but not the damages, for in this caſe, the notice is no part of the promiſe, but a conſequent, and the Judgement in Law upon it, and no penaltie but damages to be recovered: the notice is a conveniencie in Law, but by the not doing of this, the partie ſhall not loſe the benefit of the promiſe made, but ſhall recover his dammages, if no notice be given before the day, but after the day, he may ſay that ſo much money is paid, and ſo to demand this upon the promiſe, and if he deny to pay this, he may well have his Action upon the promiſe, and recover the principall, but not his dammages, and ſo the Declaration was good, and the Judgement well given, and not erroneous, but ought to be affirmed. Yelverton and Croke Iuſtices, *mutata opinione* agree with Flemming chiefe Iuſtice, that the Declaration was good, though no notice given, and the Plaintif to recover the principall, but not dammages, and ſo three Judges againſt Williams, that judgement was well given, and not erroneous, but to be affirmed, and accordingly by the Rule of the Court Judgement was affirmed. Judgement affirmed.

## *Richard Gittings* Plaintif againſt *Richard Cooper* Defendant.

The Caſe. An Ejection firme, a ſpeciall Verdict upon the Cuſtome of a Copyhold Mannor.

IN an Action of Treſpaſſe and Ejectment upon not guilty pleaded, the Jury gave a ſpeciall Verdict, and did find to this effect, that Humfery Packinton was ſeiſed as Lord of the Mannor of Chepley corner in the County of D. in which Mannor, there are divers Coppholders of inheritance, they finde further, that within the ſaid Mannor there was this cuſtome, that if any Coppiholder of the ſaid Mannor, do commit any Felony, that he ſhall forfeit to the Lord his Coppyhold eſtate, and that the Lord upon preſentment of this by the Homage, may enter and ſeiſe the ſame, the Jury finde further, that one Hunt who was a Coppyhold Tenant of the ſame Mannor had killed one Silveſter Taylor, and that the ſame Felony was preſented by the Homage at the next Court: they further finde, that Hunt was afterwards indicted for the ſame Felony, and was thereof acquitted, they finde that after his acquittall, the Lord did enter and ſeiſe the Coppihold Eſtate for a forfeiture, and made a leaſe thereof to Gittings the Plaintif to trie the Title, who by vertue of his Leaſe did enter, upon whom Cooper the Defendant as ſervant unto Hunt, and by his command did re-enter, upon which re-enterie Gittings the Plaintif brought his Ejectione firme, all which matter apppeared in the ſpeciall Verdict, Walter for the Plaintif moved two Points conſiderable in this caſe, upon the ſpeciall Verdict. 1. Whether this cuſtome be good or not. 2. Admitting the cuſtome good, whether the acquittal of Hunt the Coppholder ſhal avoid the ſeiſin of the Lord for the forfeiture. 1. This cuſtome is a good cuſtome for a reaſonable commencement, in a condition, makes this to be good, and ſo in a Cuſtome, and this cuſtome here doth tend to reſtraine a greate miſchiefe, and therefore it is a good Cuſtome, it is alſo a good Cuſtome, for that it hath a reaſonable intendement, and a reaſonable commencement, and ſuch cuſtomes which have a reaſonable commencement are good cuſtomes in Law, a reaſonable intendement may be made of this cuſtome here, for that the Lord with the aſſent of his Tenants may grant his Coppihold Eſtates upon ſuch Conditions, purpoſely to prevent the committing of ſuch offences. Alſo the place it ſelf, and the nature of the place is many times the cauſe of the beginning, and the ground of Cuſtomes, as appeareth by the Book of 12. H. 8. fo. 5. where it is ſaid that ſuch offences are felony, as the ſame have been accuſtomed and uſed ſo to be, for that in many places, ſome offences are felony, the which

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are not so elsewhere, as in the Ile of Man, there if one take a Horse or an Ore, this is there no felony, for that he cannot hide them, but if he take a Capon or a Pigge, this is there Felony, and for this he shall be hanged. And so by the custome of London, the wife in the absence of her Husband, a Merchant, may sue, and be sued, and so in Kent, the custome of Gavelkinde, being this, the Father to the Bough, and the Sonne to the Plough, these customes have their Commencements and grounds from the nature of the place, this Custome here is also good, and that for this reason, because the same is annexed unto an estate, beginning by Custome, and as touching Customes in the generall, it is to be observed, that these three Customes are not good, but utterly void. First, A Custome which is directly against Justice. 1. Secondly, If it be a Custome against the Common-wealth, this is not good. 2. And Thirdly, a Custome which is in prejudice of a third person, these three Customes are void in Law, but the custome here found in our case, is none of these, and therefore good. 3.

Objections against the Custome.

*Object.* 1. As to the Objection made, that this Custome should not be good. 1. There is no certaine time when this presentment shall be made, and so this may be examined twentie yeares after, which is very inconvenient, and therefore void.

*Resp.* To this it may be answered, that there is no incertaintie in this, for that the Lord may cause this to be done presently, or when he will, at any time afterwards, for when a man hath cause to enter for a Forfeiture, hee is not bound to enter presently, but he may enter when he pleaseth.

*Object.* 2. It may also be said that this Custome is not good, because, if the examination of this may be twentie yeares after, he may then examine this after his death, and so by this a great inconvenience may follow, for to examine an offence after the death of the partie.

*Resp.* The answer is, that this is no inconvenience, for this is only in case of a forfeiture, which may be examined after the death of the partie, but if it were in case of an Attainder, where by this the Blood is to be corrupted there, otherwise it is.

*Object.* 3. 3. This is no good Customs, for that this is against the nature of a Court Baron for to enquire of felony.

*Resp.* To this it may be answered, that here is no inquiry of Felony, nor yet of any thing to call the life of the partie in

2. Point. question, but only a particular information for to intitle the Lord to the forfeiture. As to the Second Point, admitting the Custome, whether the acquittall of the Tenant shall conclude the Lord, that he cannot now seise the Coppihold Estate for the forfeiture, the Lord may enter notwithstanding the acquittall, for that the acquittall shall not in this case prevent the custome. Steevens for the Defendant, that the Custome is not good, nor reasonable: and therefore in Littleton in his Chapter of Villenage, fo. 46. and Cokes Littleton fo. 139, 140. & pla. 209. if the Lord of a Mannor claimes by Custome to have a summe of money, by way of fine of every Tenant which marrieth his Daughter without the Licence of the Lord, this is a void Custome, the same being against the freedome of a free man that is not bound thereunto by his Particular Tenure, besides a Custome ought to have a coherence with Reason, or it shall not be good, but this Custome here is very unreasonable, by reason of the generality of it, the same being (for any felony) for unvoluntary maime, and pettie larceny is felony, but not to cause a forfeiture of any lands. Note by the Rule of the Court, this Custome was adjudged cleerely to be a good Custome, but as to the residue of the Points in this case the Court delivered no opinion, but as to these *Curia advisare vult*, in this case the parties by their mutuall assent submitted themselves unto Williams Iustice to end this matter between them without any further Argument, quod Nota.

The Custome adjudged good.

An action upon the case in nature of a conspiracie entred, Trin. 7. Iac. B. R. Rot. 568.

## *Sir Robert Stroud* Plaintif, against *Hen. Roper*, and others Defendants.

The Case,

ROper and the other Defendants preferre their Petitions against the Plaintif unto Viscount Byndon, in which Petition, they did accuse the Plaintif being then a Iustice of Peace, with oppression, and other misdemeanors, for that he having sent unto them his Warrant, for a Taxe by them to be made and rated, for provision

sion for the Kings house, and that they accordingly having made a generall Taxe, and returned the same unto him, and that he, seeing therein some of his friends to be Taxed (as he conceived) beyond their abilitie, and contrary to his Warrant, caused a new Taxe to be made, the which to pay, they refused. The Plaintif returnes their refusall, and procures a Messenger to be sent unto them, from the green cloth, and they demanding of the Taxe, some of them paid upon threats, and some refused, and upon their refusall they were by him committed to Prison, afterwards they preferred another Petition against the Plaintif, to the same effect as the other was, unto the Clerks of the Greencloth, & another petition to the Lord Chancellor, with divers articles against him, the which by their oath they did aver to be tru, & this so done, to the intent to disgrace the plaintif, unto these honourable personages, and so to cause him to be removed, and put out of the Commission of the Peace, and afterwards by the Lord Chancellor he was put out of the Commission of he Peace, and the Plaintiffe supposing this to be done, upon their false complaint, brought against them an Action upon the Case in the nature of a conspiracie, and this against them all: to this Declaration the Defendants demurre in Law. The chiefe Point in the case being, whether the Plaintif may joyne these severall conspiracies in one Action upon the Case, this was as to the manner of the Action, it was urged for the Defendants, that the Plaintiffe could not joyne them all in one and the same Action, and for this the Book case of 21. H. 7. fo. 39. was cited, where it is held by the Justices, that if one hold two Acres of one, by severall services, and dieth without heire, the Lord cannot have one writ of Escheat for both Acres, but ought to have two Writs. So (as it was urged) if two men slaunder one, he cannot at the Common Law have one action against them both, but severall Actions, but otherwise it is in the spirituall Court, where one Libell may be against severall persons. As to the matter of the Action, it was urged, that the same was not good, for that the Plaintiffe sheweth in his Declaration, that in the time of Queen Elizabeth he was made a Justice of the Peace, and that afterwards, in the time of King James, *Constitutus fuit* a Justice of the Peace, but he doth not shew *quomodo*, as he ought to have done, and so this shewing is not good, and the Declaration herein is insufficient, for it appears by the Book of 20. H. 7. fo. 8. that no Justice of Peace can be made, but by the Letters Patents of the King, Yelverton Iustice. They are not here severall conspiracies, for that all of the Defendants are charged with one and the same thing, and therefore one Action upon the Case may be well brought against them all. Williams Justice, If the conspiracies be all of them of one and the same nature, all of the Defendants may then be well joyned in one and the same Action. Fenner Justice, the Action is well brought against all the Defendants. Croke Justice, *Fama & fides sunt tanquam anima, fides, & fama, & oculus, non patiuntur Ludum*, the Plaintiffe as a Justice of Peace, could not enforce the Defendants to make a Taxe, but he might perswade them so to doe. By the exhibiting a Bill of Forgery against a Noble man, although he failes in his proofe of this, this is no cause for an Action to be brought against him: adviseth the Plaintiffe to reliquish his suit, for that *Latrantes canículos cum contemptu præterire sapientis est*. Yelverton Iustice, the Plaintiffe shewing that he was *constitutus*, made a Justice of peace, and doth not shew by whom, nor yet how he was so made, this is not good, but if he had said generally that he was a Justice of the Peace, this had been good enough. Flemming chiefe Iustice agreed in this, that he ought to have shewed by whom, and how he was made a Justice of the Peace, and for this cause, the opinion of the Court was, that the Action was not well brought, but no Judgement was given in this case, for that the parties by their mutuall consent referred the same unto Flemming chiefe Iustice, to be by him ended in an arbitrary way.

A demurrer to the Declaration.

This case ended by a mutuall reference to chief Iustice.

*Talbye*

## *Talbye* Plaintif, against *Cooke* Defendant.

An action of the case upon a promise to pay money upon an accompt, entred Mich. 7. Jac. B. R. Rott. 540. The Case.

IN an Action upon the Case for a promise to pay money, the Plaintiffe sets forth in his Declaration, that there was an accompt between the Plaintiffe and the Defendant, and that upon the said accompt the Defendant was found to be in arreare unto the Plaintiffe in the summe of six pounds, the which he promised to pay unto the Plaintiffe at a time past, and for the not paying thereof, the Plaintif brought his action upon the case against the Defendant, upon his promise. The Defendant by his plea saith and confesseth it to be true, that long time before there was such an accompt had between them, as in the Plaint is alledged, and that upon the same accompt he was found in arrerages unto the Plaintiffe, in the said summe of six pounds, for the payment whereof he entred into a Bond unto the Plaintiffe, and then concludes his plea with a Travers, *absq; hoc*, that there was any other accompt between them after this time. Upon which plea the Plaintif demurres in Law, and for cause it was alledged, that the Travers so taken was not good, for that the accompt is not in this case traversable, but the same is to be given in evidence: in this case there are two things to be considered. 1. The consideration, and 2. the Assumpsit, the which promise is only issuable, and the sole point in this case to be traversed, but not the consideration: and to warrant this, Tatams case in 27. H. 8. fo. 24. and 25. was cited. On the other side, it was urged that the Travers is good, and well taken, and that for this reason, and with this difference, where the conveyance to the Action, is materiall, and where not, where the same is not materiall, but is alledged only for to encrease dammages, there the conveyance to the Action is well traversable, but not otherwise, and in this case, if there were no accompt, then no promise to perform, and so the travers well taken. Williams Iustice, In an action upon the case brought for slanderous words spoken three weeks agoe, the Defendant by plea saith, that true it is he did speake such words two years agoe, and traverseth *absq; hoc*, that at any time after he spake the words, and this is a good travers. Yelverton Iustice, In an action upon the case for a promise, there the consideration is not traversable, but the promise on the day is not materiall, but the matter is, the difference will be this, when a sufficient satisfaction is by plea alledged to be made, and when not, and also when the satisfaction alledged, is in a thing of the same nature, and when not, but in a thing meerly collaterall, there such a travers is not good. In an Assumpsit, grounded upon a good consideration, in this case he is not to traverse the consideration generally, but the promise, and in this principall case, the Defendant doth not travers the consideration, but by his plea, he confesseth the Action, with full satisfaction made of the summe demanded, and afterwards to take the Travers, and to say *absq; hoc*, that any time after this he did accompt with the Plaintiffe, he could not have taken a better travers: for if he had pleaded in this case Non assumpsit the averrement of the accompt against him would have disproved this. The Court all agreed in this, that the travers in this case taken by the Defendant in the conclusion of his plea, being *absq; hoc*, that there was another accompt made between them, after this time of his entring into the Bond for payment of the money demanded, this was a good travers, and well taken: and therefore by the Rule of the Court, Judgement was given for the Defendant, that the travers was good, *& quod querens Nil capiat per breve.*

Judgement for the Defendant.

## A Prohibition.

A Chappell of ease taxed by the Mother Church for reparations thereof. The Case.

THat in the County of Dorcet, there was a Mother Church, and also a Chappell of Ease within the said Parish, that they of the Mother Church, did rate,

rate, and tare them of the Chappell of ease, towards reparations of the Mother Church, for the which, upon their refusall to pay the same, being sued in the Spirituall Court, they prayed a Prohibition, and for cause alleadged, that they themselves have used, time out of minde, to repaire the Chappell at their own proper cost, without having of any contribution at all from them of the Mother Church, and that they have also been exempted from all charges and reparations of the Mother Church, and yet for their refusall, to pay this Tare, they were libelled against in the Spirituall Court, and a Sentence there passed against them, and they therefore prayed a Prohibition. By the opinion of the whole Court, a Prohibition lyeth not in this case, in regard, that this prescription is meerely Spirituall, and therefore a Prohibition denied *per Curiam*.

A prescription spirituall.

Prohibition denied per curiam.

## In an Action of Debt upon a Bond.

IN an Action of Debt upon an Obligation, the Case was this, that I. S. on our Lady day in March did lend unto T. N. sixtie pounds for one year, and to have six pound interest for the same year, for the which, he was bound by a penall Bond, conditioned to pay sixty six pound on such a day, which was at the end of the year, sixty pound for the principall, and 6. l. for the interest, afterwards, and before the end of the year, that is to say, the first day of March, the Obligor paid the 6. l. for the interest to the Obligee, and afterwards did not pay the principall at the day: upon this the Obligee brought his Action of Debt against the Obligor, and he to avoid his Obligation and payment of the money, pleads the Statute of Usury, of 13. Eliz. cap. 8. for supposed taking of above ten pound in the hundred, because he took his use money within the year. It was resolved by the whole Court, that this his taking of the use money within the year shall not avoid the Obligation, and that this taking is no usury within the Statute. Williams Iustice, where the first Contract is not usurious, this shall never be made usury within the Statute, by matter *ex post facto*, as if one Contract with another to borrow 100. l. for a year, and to give him 10. l. for interest at the end of the year, if he payes the interest within the year, this is not usury within the Statute, to avoid the Obligation, or to give a forfeiture of the money within the Statute, because that this Contract was not usurious at the beginning, which was agreed by the whole Court, and Judgment given for the Plaintif.

Debt upon a Bond, the Defendant pleaded the Stat. of 13. El. cap. 8. of usury for taking the interest within the year, entred Trin. 7. Jac. B. R. Rot. 991. The Case.

Judgement for the *Plaintiffe*.

## Sir *Thomas Grymes* Plaintiffe, against *Peacocke* Defendant.

An Action of Trespasse for taking of Turfe and Stones. The Case.

IN an Action of Trespasse, for the taking of Turf and Stones, in the waste of the Plaintiffe, being Lord of the Mannor, the Defendant justifies by a *visatum fuit*, that it had been there used time out of mind, that every Tenant for years, of of an ancient Tenant, and close, within the said Mannor, use to have common of Turbary, and of Lymestones on the waste of the said Mannor, and that the Tenement and Close he now hath, is an ancient Tenement, and the same granted unto him, with all Commons appurtenant to the said Messuage and Close, accepted, or reputed, as part, parcell, or member of the same, and so justifies the taking, the Jury found the whole matter speciall. That the Abbot of *Fountaines* was heretofore seised of the said Mannor, that there were such a prescription for Common in the waste of the Mannor as belonging to every ancient Tenement, that upon the dissolution of Abbeis, the Possessions and Reversions of the Abbey came to the Crown. That 32. H. 8. the King granted the Monastery, the Possessions, and Reversions, with the Mannor unto Sir John Gresham, and that afterwards

the same came unto Sir Thomas Grymes the Plaintiffe, and that the Tenement and Close, unto which the Common is claimed came by grant unto the Defendant, upon which speciall Verdict, the question was, when the Lord of a Mannor is seised of a Waste, and a Tenant of an ancient Tenement, prescribes to have common in the waste of the Lord, afterwards the Tenement is severed from the Mannor, and the inheritance of the Mannor, and of the Tenement, being in the hands of one Lord who grants away the Tenement and Close for a terme unto the Defendant, with all Commons appurtenant to the said Messuage, and Close, whether this Common that was before belonging to this ancient Tenement, shall passe to the Grantee of this Tenement here or not. Yelverton for the Plaintiffe, that the Common in this case did not passe unto the Defendant: two things in this case are to be considered. 1. If any Common be created by this grant, or not, no Common is hereby created, 9. H. 6. fo. 35. If a man grants Common to
1. one, and doth not shew where, or out of what Land he shall have it, the grant is void: so it is in this case, it being not expressed where this grantee should have his Common, and so the grant void, 9. H. 6. fo. 36. a man grants Common of Pasture to another, *ubicunq; averia* of the Grantor *ierint*, the Grantee ought to shew in what place the Cattell of the Grantor did goe, or else he shall have no Common.
2. 2. Whether these words in the Grant, appurtenant to the House, or Tenement, shall create a Common, they shall not, unlesse the Common were appendant before, 7. E. 3. Fitz. tit. Ass. Pla. 134. a man grants Land to another with all Commons appurtenant to the same, this Common (by Herle there) doth not passe, if it were not appendant before, a difference there is between a Grant of a Rent, and a grant of Common: if a man grants a Rent to another, here his person is chargeable with it, but otherwise if a grant of a Common, for that this is Locall, then it is to be examined, whether there be any thing in this case, to make it appear that this Common is appurtenant to the Tenement, and to be taken out of the Waste of the Lord being locall, as to this, there are two sorts of appurtenants, the one in right, which goes with the inheritance, unitie of possession destroyes the Common, for that a man cannot have Common in his own Land, the unity of possession destroyes this; for the inheritance, in the waste, and in the Tenement, being in one and the same Person, no Common can then be had, and then his Lessee cannot prescribe to have Common. 2. There is common appurtenant in occupation, the Lessee here cannot have such a Common, for the prescription here is grounded upon a feeble foundation: for whereas it is here said, that every Lessee of the said House and Close, time out of minde have used to have Common in the waste, this is no such *usitatum*, to have such a cleere right to have Common without interruption, for here every new Lease and Contract is an interruption, also such a usage ought to be perpetuall, which cannot be so here. Williams Justice, A Termor shall have no more then his Lessor doth contract with him for to have, and this is a new thing for a Termor to make such a prescription, 6. E. 6. Dyer Pla. 70, 71. Isham's case, to make good the prescription there, he ought to shew, that the Parke was *Antiquum Parcum*, and because that was omitted, the prescription was not good, in this case the Terminor cannot say, that he was *Antiquus firmarius*. If a Coppiholder doth purchase the Inheritance of his Coppihold, and afterwards grants this with all Commons belonging to the same, the Common which was used with the same, when it was a Coppyhold doth not passe unto this Grantee. Croke Justice, Yelverton, & Fenner Justices, & Flemming Chiefe Justice, that in the last case, the Common that was before used with the Coppihold, did passe to the Grantee. Flemming chiefe Justice in the principall case, the Termor cannot have the Common by prescription, because there is a certain Commencement, and a certain Determination of his Estate, these words in the Grant, with all Commons belonging to the House, and usually occupied, and enjoyed with the same, with an averrement, that such a Farmour had enjoyed the Common with the House, and so plead the Grant unto him, as in this case here, (leaving out the *usitatum*) this had been good, and would have carried the Common, for if a man makes a Lease of a Farme

A difference between a grant of a rent and of a common.

Two sorts of common appurtenant. 1. In right.

2. Common appurtenant in occupation.

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to another, with these words in his lease, that he shall have Common in his Waste if afterwards he grants this Farm by lease to another, with all Commons usually occupied therewith, the Common in the Waste doth pass, and so should it have been in this principal case (if it had not been laid to be with a usitatum fuit, which is no good, nor formal pleading in Law. Yet a prescription may be good in some case, although the form of the same be altered. As if a Coppiholder prescribes to have Common in the sole of I. S. he ought in this case to prescribe in the name of the Lord: but if he prescribes to have common in the Waste of the Lord, there his prescription is to be with a usitatum fuit. Croke Justice: a Coppiholder may have common in the Waste of the Lord, if in this case the Lord confirms his estate in fee, with all commons usually occupied with the same, this creates a fee in him in the Coppihold, and a fee also in the common, for in this case benigne construction ought to be made, ut res magis valeat quam pereat. Afterwards in Hillary Term 8. Jac. B. R. this case was argued again by the Judges, and adjudged for the Plantiff against the Defendant, Williams Justice. This prescription as it is here laid, is very absurd, that such a Tenant for years should prescribe, notwithstanding such a Tenement, be an antient Tenement, the beginning of this common was by grant, and by the permission of the Lord. and this for the advancement of his Tenant, and not by prescription, and no remedy he hath for this, but only in the Court of the Chancery by way of equitie, and this hath been to him denied, for he hath been in Chancery, and thence dismissed, and therefore no remedie here. If a Coppiholder have common, and then the alteration coming (to wit) the unitie of possession, this extinguisheth the common. If a man having two Mannors, of Dam. and of Dan. and Coppiholders of both Mannors, the Coppiholders of Dam. have used to have common in the Mannor of Dam. and *è contra*, afterwards the Lord sells away both the Mannors, the Coppiholders of the Mannor of Dam. die, and others admitted, they claim the common which the other Coppiholders had, their claim is not good, as it hath been resolved, for that the common was extinct by the alteration. Flemming chief Justice, as to those words in the Grant, reputed, or used, as part, or parcel of this, this shall not extend to common, that the same was parcel, it being not so, but by permission, but if the conveyance had been by averment special, that he should have the same Tenement with such commons and profits as had been before used by the Farmors formerly enjoying the same, this had been good, this cause is very conscionable and full of equitie, but not well pleaded here with a usitatum fuit. Croke Justice, the pleading here with a usitatum fuit is not good, but idle and very absurd all prescription. In alieno, non in proprio solo, a man may prescribe. A Termor may prescribe, but it is to be in such a manner, not in his own name, but in the name of his Lord, that he hath had for himself, and for his Farmors, but not otherwise, Yelverton Justice, this prescription, as it is laid in the principal case here is not good. Fenner Justice, the Farmer here cannot have common, the prescription, as it is laid, is not good: if a Lord of a Mannor hath a Waste, and he grants unto others that they shall have common in this Waste, yet the Lord himself also shall have common there, but he hath this in respect of his interest, for if he have no common, he can grant no common. Flemming chief Justice, if it had been here laid, with all commons, profits, and used, occupied, and enjoyed with the Tenement, by the Farmers, this had been good, but not as the same is here laid. The grant here by it self without a usitatum fuit will not aid him, and couple both together, the Grant here with a usitatum fuit, as it is here, this is all one in effect, and shall no wayes aid him, for here the usitatum est is annexed unto the estate of the Termor, which cannot be good, and the same usitatum unto the lands as it ought to be, to make the Grant good. All the Court agreed clearly, that this prescription as it is laid here with a usitatum fuit is not good, for to intitle the Defendant to have common, and so to make his justification good, and so by the Rule of the Court, Judgement was given for the Plantiff against the Defendant.

Common claimed by a Termor with a Usitatum fuit, not good.

Difference where a Coppiholder claims common in the soil of another, and where in the waste of the Lord.

Hillary Term 8. Jac. B. R. adjudged *pro quer.*

Unity of possession extinguisheth a Common.

Judgement given for the Plantiff.

## *Crewes* Plantiff, against *Draper* Defendant.

DRaper had divers creditors, all of them, but one, being the Plantiff, did give him two, or three years day of payment, and the other creditor, (being the Plantiff would not agree unto this) but would have his money presently, or would commence his action for recovery of the same, and for stay of his proceedings at the common Law. Draper petitioned against him in the Court of requests, and prayed the Court to order him to yeeld and stand to the time of payment limited by the other creditors, at which time he offered to put in good securitie for to pay them all. The Court of requests cal-

In a Prohibition to the Court of Requests. The Case.

led him before them, and moved him to yeeld thereunto, the which he refuſed to do, but ſaid that if he would preſently give him good ſecuritie to pay him in ſome reaſonable time which he ſhould give him, with this he would be ſatisfied, otherwiſe he would forbear him no longer: *Draper* to do this refuſed, but prayed an injunction from the Court, for to compel him to ſtand to the time limited by the other creditors, the which was granted by the Court, and upon this Crewes the Plantiff moved for a Prohibition to ſtay the proceedings in the Court of Requeſts, againſt the granting of this Prohibition was objected the prioritie of ſuite in the Court of Requeſts. Yelverton Juſtice, this prioritie of ſuit there makes nothing in the caſe, as to the granting of a Prohibition, for when the propriete of ſuit, is here in B. R. another Court, as the Court of Requeſts cannot grant an Injunction, to ſtay the proceedings here, but when the Court of Requeſts hath the prioritie of Action, then this Court upon cauſe ſhewed, may well grant a Prohibition to ſtay, and prohibit their proceedings in that Court. Flemming chief Juſtice agreed in this with Yelverton. Flemming, this creditor may have ſome cauſe to be harder with *Draper* then the other creditors, and he may well have, and purſue his remedie at the common Law for his money, and if Draper refuſes to give ſecuritie to pay the money, according to the requeſt and offer of the other, but procures an Injunction, a Prohibition ſhall then be granted, by the Rule of the Court to ſtay the proceedings in the Court of Requeſts, and the matter ſhall be tried here, and if notwithſtanding this, the Court will there proceed and grant an injunction, this Court will ſtay their proceedings, and by our directions here the partie ſhall not obey their injunction, and an Attachment ſhall alſo be granted by this Court, againſt the Suitor there. Man. Secundar. there have been divers Prohibitions granted here in the like caſes, and by the Rule of the Court a Prohibition was granted.

The difference where prioritie of ſuit is in B.R. and where in the Court of Requeſts.

A prohibition granted *per Curiam.*

An information for uſury upon the ſtat. 13. Eli. cap. 8.

An information upon the Statute of the 13. of Eliz. 2. cap. 8. for Uſury. The caſe was, the contract was, that he to whom the money was lent, ſhould give ſuch a ſumme for the Loan of the money, and by this agreement the ſumme he received ten dayes after, the Loan was more then 10. l. per annum for 100. l. this was adjudged by the whole Court to be an uſurious contract ab initio.

2 Roll. R. 262.

For the reparations of a Church, what Land to be charged, and how, and what perſons.

As touching the Reparations of a Church, and who were lyable thereunto, this being a queſtion coming in debate before the judges: it was reſolved by the whole Court; that for, and towards the Reparation of a Church, the land of all, as well of Forreiners there inhabiting, as of all others, is liable thereunto, and this is ſo by the general cuſtome of the place, and this is to be raiſed, by a rate impoſed, according to the value of the Land, and that in the nature of a fifteen, and this is not meerly in the realtie, Williams, and Yelverton Juſtices, and Flemming chief Juſtice, Not the land, but the perſon of him who occupieth the Land is to be charged. Yelverton Juſtice, A man is chargeable for reparations of a Church, by reaſon of the land, and for the Ornaments in the Church, by reaſon of his coming to Church. Williams Juſtice, and Flemming chief Juſtice, If the partie have land there, he is chargeable for both, whether he come to Church, or not, for that he may come to Church if he pleaſe.

## *Odill* Plantiffe, againſt *Tyrrel* Defendant.

A challenge of a Juror for giving of his Verdict beforehand.

What challenge allowable, and what not.

UPon a trial at the Bar by a Northamptonſhire jury, between Odil Plantiff, and Tyrrel Defendant, a juror was challenged, for that he ſaid unto one of the parties, provide you to pay, for if I am ſworn, I will give my verdict againſt you, and that this is true, the partie to whom the words were ſpoken, did offer to depoſe the ſame, (if he may be ſuffered to ſwear, and whether he ſhould be ſuffered in this caſe to ſwear, to prove this,) he being on of the parties, was the queſtion, Fenner Juſtice. He may well be ſworn in this caſe, to prove the challenge good, and by the Court he was allowed to be ſworn to make good the cauſe of his challenge, which being proved by his Oath, the Triors found him for this cauſe not to be indifferent, and therefore he was withdrawn. Another juror was challenged in this caſe, for that he had bought land of one of the parties in the ſuit, (s) of the Leſſor, and that the Leſſor did owe to this juror 10. l. notwithſtanding this challenge, the Triors found him to be indifferent, otherwiſe it had been per Curiam, if the juror had owed money to one of the parties.

Where

Where the Husband and wife are to joyn in an Action, and where not. It was held by the Court, that if a diſſeiſin be made upon the Husband and wife, in the lands of the Wife; in an Action brought for to recover the land again: in this Action the husband and wife are to joyn but in an Action of Treſpaſs they may ſever. If a man promiſe to give 100. l. to the wife of I. S. they ought per Curiam, to joyn in an Action for recovery of this. Flemming chief Juſtice, if a leaſe be made by husband and wife, of the land of the wife, rendring rent, in an Action for rent behinde, they are both of them to joyn. Yelverton Juſtice, in the laſt caſe they need not to joyn, and ſo is Markhams opinion in 7. E. 4. fo. 7, 6. that in ſuch a caſe, where the husband alone brings the Action for rent behinde, it was never queſtioned, but that this Action, by the husband alone, was well brought, but where the ſame hath been brought in both their names, it hath been queſtioned, whether this were good, or not. Where the Husband and Wife ought to joyn in an action to be bronght, and where not.

## The Lord *Evers* caſe, and *Strickland*, entred Paſch. 7. *Jac. B.* *R.* Rot. 405.

A Conveyance was made to Rodolfe Evers Knight, Lord Evers, and for to avoid this conveyance, it was alledged, that at the time when this conveyance was ſo made, he was not cognitus & reputatus per nomen militis, that he was not then a Knight, and whether this ſhall make void the conveyance, or not, was the queſtion. In this caſe was cited at the Bar, Mich. 27. E. 3. fo. 85. Fitz. tit. Grants. pla. 67. Where an Abbot, by, and with the aſſent of his covent, did grant a common in his land, and this Grant was by the name of Richard Abbot, whereas his name was Robert Abbot, this Grant was there held to be good, notwithſtanding this miſnaming of his chriſten-name, by the opinion of the Court, and Perkins in his chapter of Grants, ſo. 8. pla. 36. where it is ſaid, that the name of the Grantor is not put in any deed, to any other intent, but only to make a certaintie in the Grantor, and in the Grantee. In this principal caſe, the judges did all of them clearly agree, that the conveyance ſo made unto Ralf Evers Knight, Lord Evers, is a good conveyance, and that the plea in Bar to make void the ſame, is no good plea: for that where a thing is ſo granted unto one, by ſuch a name, as that he cannot be intended to be another perſon, this is good, without any chriſten-name expreſſed, and as the caſe here is, there is but one Lord Evers, and therefore this is certain enough, for that the ſame doth well conſtare de perſona, and therefore the other addition here of Knight (though falſe) notwithſtanding this, yet this falſitie ſhall not take away the deſcription of the true perſon, to whom the conveyance was made, but that he ought to have the ſame, being here ſufficiently expreſſed by the name of Lord Evers, and therefore, by the opinion of the whole Court, the plea in Bar here is not good, but the conveyance is good, and ſufficient to carry the land conveyed unto the Lord Evers, though he were then no Knight, and this was the judgement of the whole Court. Conſtruction upon a Conveyance.

## *Smith* Plantiffe, againſt *Skipwith* Defendant, entred Paſch. 7. *Jac.* *B. R.* Rot. 653.

IN a Writ of error to reverſe a judgement given in the C. B. in an Action of debt, the error aſſigned was, for that no Warrant of Atturney was entred in the ſuit in ſuch a Term. Williams Juſtice, it is a crafty courſe to aſſigne for error, that there was no Warrant of Atturney entred in a Term certain, this error aſſigned, is a clear error, and for this cauſe, the judgement given is erroneous, and to be reverſed, becauſe there was no Warrant of Atturney, and ſo the Rule of the Court was quod judicium revocetur, but in aſmuch as this was not entred of Record, and for that the entrie of the warrant of Atturney in another Term was good; a certiorari was prayed, to inform the Court of all the proceedings, in regard that the judgement for reverſal was not entred of Record, and the certiorari prayed only to inform the Court, whether any warrant of Atturney were entred, or not, and when. Williams Juſtice, if the appa-

rance Error that no warrant of Atturney was entred in ſuch a Term for this error judgement reverſed.

Before this entred of Record, a certiorari was prayed and granted *per curiam.*

rance were in this Term, and judgement entred without any Warrant of Atturney, the warrant of Atturney may be entred in the next Term following, and this is clearly good. The judges then ſaid unto the Plantiff, in the writ of error, this was your fault and neglect, that the judgement for the Reverſal was not entred of Record, for if the ſame had been entred, then this motion had been prevented, but for this omiſſion, a certiorari was granted by the Rule of the Court.

## *Anne Bartholomew* Adminiſtratrix of *Thomas Bartholomew* Plantiff, againſt *Savage* Defendant entred Hill. 7. *Jac. B. R.* Rot. 445.

In an action of Debt upon a Bond.

In an action of debt upon a Bond, the caſe was this, there being an old leaſe in being, the condition of the Bond was, Savage the Defendant upon the aſſignment, and giving up of the old leaſe, would make a new leaſe, for the like term unto the Leſſee. In an action of debt brought upon the Bond, againſt Savage, for not performing on his part according to the condition of the Bond, the Defendant pleads the old leaſe, and the aſſignment of this made, &c. but ſaith nothing at all of the new leaſe to be made by him, according to the condition of the Bond, the Court agreed this plea to be a good plea, and therefore the Rule of the Court was quod judicium intretur pro querente.

## The Lord *Rich* Plantiff againſt *Frank*, as *Adminiſtrator* of *Thomas Frank* Defendant entred Hill. 7. *Jac.* *B. R.* Rot. 488.

Judgement *pro quer.*

For rent in his time brought in the *debet, & detinet.*

Difference where the Defendant is charged only as Adminiſtrator, or as Executor there to be in the *detinet tantum*, and where a *partim* as Adminiſtrator and *partim* in reſpect of his occupation of the land there to be in the *debet, & detinet.*

In an action of debt for Rent behinde, againſt the Defendant, as Adminiſtrator of the goods of Thomas Frank his Father, to whom the leaſe was made, by the Lord Rich, rendring rent. Thomas Frank the leſſee died, Frank the Defendant his Son takes letters of Adminiſtration, and for rent incurred in his time the Lord Rich the leſſor brought an action of debt, and in this the debet & detinet, and whether this action were well brought, being not in the detinet tantum (as was urged, it ſhould have been) was the queſtion, Williams Juſtice. An adminiſtrator ſuffers Rent to be behinde in his own time, whether an action of debt brought for this Rent, ought to be brought in the debet, & detinet, or in the detinet tantum, this is the ſole matter of ſubſtance in this caſe, the Defendant is here to be charged, in reſpect of his poſſeſſion, and not otherwiſe, but as an adminiſtrator, this action is here well brought, in the debet, & detinet. Coke 5. pa. fo. 31. en Hargraves caſe, it was ſo adjudged in this Court, unto which judgement credit is to be given, till the Record of the Reverſal may be ſeen, and the reaſons for which the ſame judgement was ſo reverſed, and in 7. E. 6. Dyer pla. 82. an action of Debt brought againſt the Executors of Potter in the debet, & detinet, for rent behinde, in his own time, and the ſame there held to be well brought. If the rent behinde in his own time, he ſhall be chargeable to pay this, de bonis propriis. It is to be obſerved, that whenſoever a man brings an action againſt one, as Executor or Adminiſtrator, this ought to be alwayes brought in the detinet tantum, but this caſe here now in queſtion, doth varie from all the other caſes, for that he is not here charged only as Adminiſtrator, but in reſpect of his poſſeſſion, and in this reſpect, he ſhall be charged de bonis propriis, and for this reaſon was it ſo adjudged in *Hargraves* caſe in this Court, Mich. 41. and 42. Eliz. And ſo the action here in this principal caſe is well brought in the debet, & detinet. Croke Juſtice accordante, the action here is well brought, and the difference will be this, where he is only charged, as adminiſtrator, or Executor, there the action ought for to be in the detinet tantum, but where he is charged, partim, as adminiſtrator, & partim of the occupation of the land, there the action ought to be brought in the debet, & detinet, and he cannot waive the Term, but he may at the firſt refuſe the occupation of the ſame, and then the charge in the judgement, de bonis teſtatoris, ſo that he may well waive the occupation of the land, but if he once agrees unto this, by taking of the profits, then he ſhall be charged, in reſpect of this his occupation

occupation, and in this case, the charge shall be against him, *de bonis testatoris*, if he hath sufficient to make satisfaction, but if not, then *de bonis propriis*, and so in this principall case here the Action is well brought, Flemming chiefe Iustice. The Action here is well brought, and this agrees with the first Judgement given in Hargraves case. If the intestate dies but one moneth before the Rent day comes, and his Administrator enters, and occupieth the Land, he shall here be chargeable with all the Rent, notwithstanding that he takes nothing of the profits, and the Action to be brought for this, shall be in the *debet*, *& detinet*, this is a case very worthy of good advice, and deliberate consideration, if Lessee for years, rendring yearly 10. l. Rent, dies, if his Executor or Administrator hath not received any more of the profits of the Land, then is sufficient for to pay the Rent in this case, in an Action brought against him, he may well plead against all the world, that he hath no more in his hands, then will serve for to pay his Rent, and this is a good plea, the which Rent being thus reserved, ought in the first place to be paid before all other debts, but he may, if he will waive the occupation of the Land, and then the same shall be extended for the residue of the Rent, if he have not assets in his Lands. Yelverton ~~Justice~~, at the Barre, this Action is not well brought, in the *debet*, *& detinet*, but the same ought to have been in the *detinet tantum*, for where in an Action of Debt brought against Executors, they are of necessity to be named Executors, there the Writ ought to be in the *detinet tantum*, but where there is no such necessitie for to name them Executors, there it is well, there it is well in the *debet*, *& detinet*. In the principall case here they cannot declare, but upon the Lease made to the Testator, and therefore it ought to have been in the *detinet tantum*. Flemming chiefe Justice, The ground before is well taken, that where of necessitie he is to be named Executor, in an Action brought against him, there the same ought to be brought in the *detinet tantum*, but herein the difference to be observed, will be, where it is in a meere personall thing, which hath his end, by the suite, there if in such a case, he is of necessitie to be named executor, there it is true, that the Writ ought to be brought against him, in the *detinet tantum*, but if the same suite be in the realty, and for a reall suite, there it is otherwise, and the Writ shall be brought, in the *debet*, *& detinet*. And in this Principall case, he hath the occupation of the Land, by reason of which, he is charged with the Rent, which is the realtie, and so the Writ well brought in the *debet*, *& detinet*, 21. H. 6. fo. 24. Brooke tit. Waiver Pla. 9. An Executor of a terme may waive it, and then he shall be discharged of the Rent, and shall not be chargeable for any arrears, *de bonis propriis*, but if he once occupies the Land, he shall be then chargeable, *de bonis testatoris* (if he have any in his hands) and if not, then *de bonis suis propriis*, for that an Executor is an assignee in Law of the interest of the terme. Williams Justice, the Writ is here well brought, against the Defendant in the *debet*, *& detinet*, and there is no Book against this, but 10. H. 7. fo. 5. where the case was, an Action of Debt brought against one as Executor, and counts that a Lease was made of Lands to the Testator rendring Rent, and for rent behinde after the death of the Testator, the Action was brought in the *detinet tantum*. Keble there demands Judgement of the Writ, for that it ought to have been in the *debet & detinet*, is as much as the arrerages were supposed to be behinde in the time of the Executor. Fineux there to the contrary, here in this principall case, the Action is well brought in the *debet*, *& detinet*, and Hargraves case was so adjudged in point, but the same was afterwards reversed upon another matter, and for other Reasons. Croke and Fenner Iustices, the Action here is well brought in the *debet & detinet*. The Court all agreed in this, and therefore the Rule of the Court was, *quod judicium intretur pro querente*.

Note the difference where the suite is in the personaltie, and for that which is ended by the suite, and wherein the realitie.

21. H. 6. fo. 24. Brooke tit. Waiver, plac. 9.

10. H. 7. fo. 5.

Judgement entred for the Plaintif.

*Stone*

## *Stone* Plaint. against *March* Defendant.

In a Writ of Error for to reverse a Judgement in the C.B. in a Writ of right, error because at full age he prosecuted by his procheine amy, and not by his Atturney. What to be assigned for error, and what not.

IN a Writ of Error, to reverse a Judgement given in the C.B. in a Writ of Right, and assignes for Error, that the Plaintiffe in the Writ of Right, did appear by his procheine amy, and that afterwards he came to his full age, and did prosecute his Suite, and recovered per procheine amy being of full age, whereas he ought to have appeared in proper person, by Baily, or by Atturney. It was urged by the Counsell at the Barre, that this ought not to be assigned for Error after Judgement given in 19. the Book of Assises, Pla. 8. it appears, what may be assigned for Error after Judgement, and what not, if it be not such a matter, as being pleaded, would have abated the Action in *facto*, this is not to be assigned for Error after Judgement, in 5. H. 7. fo. 3. in an Action of Trespasse, Error was assigned to reverse the Judgement, because that after issue joyned, and before Verdict, the Atturney of the Defendant died at such a place, by the opinion of the Court, this was held to be no Error, for that the Writ did not abate by the death of the Atturney of the Defendant, neither by this is the issue waived or discontinued, for that he may appear by another Atturney, or in his proper person, and the continuance is not between the Atturneyes, but between the parties, & so the continuance is not taken by the atturneyes, but by the parties. Also a man shall not plead a collaterall Error to reverse a Judgement, unlesse that such a matter (if pleaded before) would have abated the Action in *facto*. Also a man shall not assigne for Error, any thing which is contrary to the Record as an entrie, hanging the suite, nor yet any thing which is contrary to the duty of a Judge, as that he gaue Judgement for the Plaintiffe, whereas he ought to have given Judgement for the Defendant. Williams Justice, as to the Error assigned, in this case, the Demandant hath the best, and more certaine knowledge of his own age, then any other, and when he comes unto his full age, then at his perill, he ought to enform the Court of his being of full age, and so to have had an Atturney in the place of his prochein amy to prosecute the suite for him, and this omission here makes the proceedings to be erroneous, and this may very well be assigned for Error after Judgement, notwithstanding it did not goe, or operate in abatement of the Writ in *facto*, and death may be at any time alledged for Error, and the Court here cannot have any certaine knowledge of his age, without information to them given of the same. Fenner, & Croke Justices, & Flemming chiefe Justice, without some information given to the Court of his age, the proceedings in Court are Legall, and not Erroneous: and if in such a case the Judgement had been given against him, who in such a manner had made his appearance, and afterwards he would plead this for Error to reverse the Judgement, he cannot by this way avoid the Judgement as erroneous, and if it be so in such a case, by the same reason, it shall be so where the Judgement is given for him, which appears and prosecutes in such a manner as before, and so this Judgement not reversible without great advice, this being in a Writ of right. Yelverton Iustice, the partie himself ought to have given notice unto the Court, of his coming to his full age, for as well as he might have knowledge of his non-age, he may as well have knowledge of the time of his full age, but whether this omission in not making of his full age known to the Court, shall make the Judgement to be Erroneous, of this he will be better advised. Flemming chiefe Iustice, If a Feme sole be Demandant, in a Writ of Right, and during the Trial, and before Judgement, She takes a Husband, and afterwards Judgement is given for her, as for a Feme sole, without saying any thing of her husband, the Judgment thus given, is not erroneous. Yelverton Iustice, if in the principall case, this Error assigned should make the Judgment erroneous, this may be now well assigned for Error, notwithstanding it would not have abated the Writ in *facto*. Fenner Iustice, if one appear per prochein amy, being within age, and afterwards, after verdict, and before Judgement, he comes to his full age, and then

Judgement

Judgement is given, this shall have relation to the time of the Verdict given, and so the same judgement not Erroneous. Afterwards Termin. Mich. 8. Iac. B. R. this case was debated again and argued by Harris Ser. that the Judgement given was not Erroneous, neither was this matter assignable for error after judgement given, for asmuch as it is but matter of Grace and Favor, but not of Right, the admittance of the Plaintiffe being within age, per prochein amy, et per son gardian, and the matter of prochein amy is not issuable, and it rests in the power of the Court, to have a care, for the benefit of the Issue within age, this is not assignable for Error, the Rule of the Law, being, that a man shall never assign that for error, of the which, he could not have advantage by way of Plea, neither shall a man have any advantage by way of error, for an error, en fait, where before he might have had benefit of it by way of answer, as appears by the case of Mich 36. E. 3. Firz. tit. error. pla. 82. where the case is this, en Dette, where an Exigent is awarded, where no *Capias pluries* issued, the Defendant came in upon the Exigent, and pleaded, and upon his plea was condemned, he shall no advantage of this, by way of Error, because he hath admitted the proces good by his pleading to it, otherwise it is, if the originall had been bad, for that this cannot be amended, and therefore in such a case, after pleading he may have advantage by way of error, or by his alledging of this matter before Judgement. An Infant cannot make an Atturney, and therefore he cannot appear by Atturney, and this may at all times after be assigned for error. Again, this is not Assignable for Error, for that here is a Verdict given and past, and the matter now assigned for error, is no more but that the Plea is discontinued, and the Verdict aids all this, and that by the Stat. 32. H. cap. 30. of Ieofoyles, and therefore the Judgement not erroneous, and prayes affirmance of the same. First, because this is not assignable for error, for that he might have had his plea unto it, and the same is not such a matter in Fact, as would have abated the proceedings in Facto. Secondly, this not assignable for error, being a thing done against the Office of a Judge, as a Judge. Thirdly, If Error, and assignable, yet the same is but in the nature of a Discontinuance, and so will not hurt after a Verdict, the same being aided by the Stat. of 32. H. 8. cap. 3. of Jeofoyles, and so in the giving of this Judgement the Court did not erre, and the same therefore ought to be affirmed. Flemming Chiefe Justice, and Williams Iustice, this is not assignable for error, for that the Court is not to determine, or to take notice when the Plaintiffe there came to his full age, but this ought to have been pleaded, and if not pleaded then, there is now no time to plead it, and by this Laches, the benefit of this now lost for ever, also this Writ of Right is a speedy Writ, and so ought to have a speedy end, afterwards Trinit. Term 9. Iac. B. R. Williams Iustice, it hath been the opinion of the whole Court before, that the Court ought not to take notice when the Plaintif came to his full age, and the Defendant there hath now surceased his time, this might have been pleaded before Judgement, but not now assignable for error, and therefore by the Rule of the Court, *nullo contradicente*, the Judgement was affirmed, *quod nota*.

Termin. Mic. 8. Jac. B. R. this case argued again.

*Admittance procheine amy is matter of grace, not of right.*

Procheine amy not issuable.

The Rule of Law, not to assign that for error, of which he could not have any advantage by way of Plea.

1.

2.

3.

Trin. Term 9. Jac. B. R. Judgement affirmed pro curiam.

## *Yate* Plaintiffe, against *Roules* Defendant.

IN a Writ of Error to reverse a Judgement given in the C. B. in Action of Covenant there brought by Roules and others Plaintifs against Yate, upon Covenants between them made in writing, in the which there was wanting the ordinary words of Covenant, the words of the Covenant being these, that is to say, *Conventum, et aggreatum est* between the parties in *forma sequenti*. That Yate and his Wife to leavie a fine unto Roules, and Roules to make a lease to Yate and his Wife, the error assigned, and insisted upon, because the Plaintiffs did joyn in the Action of Covenant, whereas they ought not to have joyned, the question being, whether in this case, the covenant were joynt or single. Flemming chief Iustice, *conventū, & aggreatū est* between the parties, this is a joynt covenant, & they all ought,

*A writ of error to reverse a judgement in the C. B. in an action of covenant entred Hil. 7. Jac. B. R. Rot. 517.*

Question whether the Covenant be joynt, or single.

as here they have done to bring their Action of Covenant joyntly, and so is it adjudged in Slingsbies case, Coke 5: pa. fo. 18. 19. there the words are *conveniſſet, promiſiſſet, & conceſſiſſet, ad &c. cum dictis, &c. et ad &c. cum quolibet & qualibet eorum quod, &c.* and it was there adjudged, that they all ought to joyne, and the Judgement there was reversed, because they did not all of them joyne, the Covenant being joynt, but where their Interests are severall, there they may well have severall Actions, otherwise not, where the same is joynt, as in this case. Williams Iustices; the Covenant here in this Case is a joynt Covenant, and therefore all the parties interested are to joyne in the Action of Covenant, and in their so doing, they did well, and so the Judgement was well given for them, and not erroneous, and therefore the same ought to be affirmed, and this appears to be so by Mathewsons case, Coke 5. pa. fo. 22. 23. where the words of the Covenant were *Conveniunt ſeparatim, &c. ad performationem, omnium & ſingulorum conventionum, & quilibet mercator ſeparatim obligat ſeipſum*, & there resolved, that although the Merchants joyne in Covenant (s) *conveniunt ſeparatim*: this word (*ſeparatim*) makes the same to be severall Covenants, and not a joynt Covenant, but in the principall case here, there is not the word (*ſeparatim*) but *conveniunt & aggreatum eſt* between the parties, and this makes the Covenant to be joynt. Yelverton, Croke, and Fenner Justices, the Covenant in this case is a joynt Covenant, and that they all of them ought to joyn in the Action of Covenant, and they have well done in their so doing, and therefore the Judgement was well given for the Plaintiffes in the C. B. and so to be affirmed. Flemming Chiefe Justice, where there is matter precedent, and apt words to draw severall considerations, as in Mathewsons case before, there severall Actions of Covenant are to be brought, but otherwise it is where no such matter appears, as in this principall case, and therefore the Covenant here being joynt, the Plaintiffes ought to joyn in the Action of Covenant, and so the Judgement well given for them, and to be affirmed. Fenner Iustice, if a man be bound to three, *ſolvendum*, to one of them, this is joynt, and they ought all of them to joyn in the Action, and so in the principall case here, and so by the Rule of the Court, *affirmatur judicium* for the Defendant in the Writ of error.

*Conveniunt ſeparatim* makes the Covenant to be severall.

Judgement affirmed per curiam pro defendante in erroꝛe.

## *Starkey* Plaintif, against *Poole* Defendant.

A Writ of error to reverse a judgement at Chester in a Quare Impedit entred. Hil. 7. Iac. B.R.Rot. 496.

IN a Writ of Error to reverse a Judgement given at Chester in a Quare Impedit, where the case was this, that Sir Cotton being seised of an Advowson in Fee simple, the Church being full, he grants *præſentationem* to one. *Quandocunq, & quomodocunq; eccleſia vacare contigerit, pro unica vice tantum*, and in this grant there is this clause (s) *Ac inſuper voluit & conceſſit*, that this Grant shall remain in his force, *quouſque clericum habilem, & idoneum*, by his presentment shall be admitted, instituted, and inducted, and afterwards he grants away the Inheritance of the Advowson in fee simple, the Church becomes void, the Patron presents, the Church becomes void the second time, the Patron presents Pool, and upon a disturbance by Starkey, the Presentee of the Grantee a Quare Impedit brought, and Judgement given for the Plaintiffe, and to reverse this Judgement, a Writ of Error brought, wherein the question was whether this Grantee not presenting upon the first avoidance, hath not by this his Laches surceased his time, and so lost the benefit of his Grant to present againe. Walter, that the Judgement is well given, and to be affirmed. This

1. case consists of two parts. First, What doth passe by this Grant. Secondly, whether the Clause in the Grant, (*Ac inſuper voluit, &c.*) shall enlarge the Grant, or not. First, as touching the Grant of the presentation, *quandocunque & quomodo-*

*quomodocunq; ecclesia vacare contigerit, pro unica vice, tantùm* whether by this grant and the words in the same the Grantee hath a libertie to present when he will, whether he shall be compelled to take the next presentment, when the Church shall first happen to be void after the Grant made, by this Grant he ought to take the next turne when the Church falls first void, and that for this reason. In all cases where the limitation is uncertaine, as in this case here it is, there by the Judgement of Law, there ought to be the soonest and speediest execution of the same as may be, and so it shall be in this case, the Grantee taking the next Presentment, at the first and next avoidance, this may fitly be resembled to the Bishop of Bathes case, Coke 6. part. fo. 34. 35. for where a thing is left to the construction, and consideration of the Law, the Law delights in the effecting and executing of this, in as short and speedie a time as may be. As if a man make a Lease for twentie one years, and no time is limited when the same shall begin, there by the Judgement of Law it shall begin presently, for that every estate ought to take effect as soon as may be, and as touching the Execution of Estates, where the time is least to the operation of Law, the Law respects no time, but the soonest. 2. As to the clause (in a *per volun*) this clause shall not enlarge the Grant, neither by the intent of the Grantor, nor yet by the Law, not by the intent of the Grantor, for that this clause, by the intent of the Grantor, was only put in to manifest thus much, that the Grant should stand in force untill the Clerke of the Grantee presented, be admitted, instituted, and inducted, and for no other intent whatsoever, and to be in force untill the Grantee have presented, and further to manifest, that he ought not to present to the next avoidance, unlesse that he lawfully might so doe. In this case, no assignee shall present, but the Grant shall be good only unto himself, and by his death, the Grant (if not effected) shall be determined. And if the Grant had been, that the presentment should be by him, or by his assignes when he will, there such a grant made, with these generall words, shall be void, otherwise, no Laps or usurpation would barre him, the which is against the very nature of an Advowson, for whosoever hath an Advowson, ought to have it, withall, that by the Law belongs unto it, and this is to be prejudiced by laps, by him suffered, or by usurpation, and therefore such a generall Grant would be void, the same being against the proper nature of an Advowson. Also if a man that hath an Advowson, grants to another one avoidance, but saith nothing of the next, or when he shall have it, by this Grant he hath an interest passed unto him, and all interests ought to be reduced unto a certaintie, and that as soon as may be, by the intendment and construction of Law, and further, as to the clause of the Grant, that it shall be in force, untill his Clerke be admitted, instituted, and inducted, *et quandocunq; & quomodocunque Ecclesia vacare contigerit*, these are but words of Circumlocution, and not of Substance, they are Adverbs, that do supply the diversitie of means, and times when the Church shall be void, as first, by death, secondly, by Deprivation, thirdly, by Cession, fourthly, by Resignation, so that the presentment of the Grantee hath reference unto foure times, and therefore if a Church be full, and the next avoidance is granted, after the vacancie of the Church by Deprivation of the Incumbent, and after the Incumbent dies, the Grantee shall not present by force of the Grant, for that his time limited, is not as yet come, also those words in the Grant are not of any force, or effect, to give any Election unto the Grantee, to present when he will, but he ought to take the next turn or none, and herein there will be a difference, where the presentment is knit unto one Church, and where unto divers; where unto one Church, as in this case, there no Election, but otherwise where it is to one of divers Churches. Also these three mischiefes would follow, if this Grantee should present, when he will. First, the true Patron could not then certainly know when to present. Secondly, the true Patron should be then disabled, for to make any new grant, by reason of the incertainty of time, when the first Grantee will present, & Thirdly, the Ordinary cannot then tell when to make an enquiry *de jure patronatus*, and if this should be so, the Church might then for ever remaine Litigious, for that the Jury cannot make any inquiry *de jure patronatus*, the case in Fitz. Nat. bre. fo. 144. R. where the King is to have *annum*, *diem*

2.

A Church may be void by foure wayes.

Note the difference where the presentment is to one Church, and where to divers.

Three mischiefes would ensue if the Grantee should present when he would.

*diem et vastum* by his prerogative, the Law hath so confined him, as that he ought to take the benefit of this, presently when it falls, or else he shall lose the same, and if the Law be so in the Kings case, *à fortiori* it shall be so, in the case of a common person, and therefore here in this case, he ought for to present at the next avoidance, or not at all. J. Croke argued on the contrary, in this case the Grantee may present and take his turn when he will, and no mischiefe at all herein: and it is the Office of a Judge, to make the deed to stand according to the words of it, (if the same may be agreeable to the Rules of Law) if the Grant here had been of the next avoidance, there he ought of necessitie to take the next, but here it is not the next, but *quandocunq; et quomodocunq; Ecclesia vacare contigerit, pro unica vice tantum*, and therefore he may take the same presentment when he will, for it is not here said in the Grant, *quando primo vacare contigerit*, but *quandocunq; vacare contigerit*, and the Grantee here is to have the same in as ample and large manner, and liberte, as the Grantor himselfe had the same, and a difference there will be between Interests and Authorities, and Interest in Land, and therefore if a man grants to another one Crop of his Meddow, *quandocunq;* he will have the same, this is a good grant, and he may take the same when he will, and so in the principall case here he may take his turn when he will, and no mischiefe thereby unto any one. Flemming chiefe Iustice, in this case, if it were not in respect that it is in a Writ of error, it were not worthy of an argument being so cleere a case, by this Grant, the Grantee hath an Interest, and not an Authoritie, and if a man have an interest, if the same be not vested in him, he cannot grant this over to an other: and cleerely in this case, the Grantee ought to take his presentment by force of the Grant at the next avoidance of the Church. Note that Termin. Mich. 8. Jac. B. R. this cause was moved again and argued by the Judges. Yelverton Iustice in this case the Grantee ought of necessitie to present at the next avoidance which happens, or not at all. Flemming chiefe Iustice accords that he ought to take the first presentment which happens, and he hath no election to take any other turn but only the first, when the Church became first void, and by his not then presenting, he by his own Laches, and neglect, hath lost the benefit of his Grant, and so the Judgement well given against him, and not erroneous. Williams Iustice of the same opinion, that the Grantee here ought to take the first presentment at the first voydance of the Church, and if it were in the case of the King he could not do otherwise, but in such a case, he ought to take the first which falls void, or none. Croke Iustice accordant, that of necessitie he ought to take his presentment upon the first avoidance, which happens after the Grant and not any other, nor in any other manner, by force of this Grant made unto him. Flemming chiefe Iustice agrees with Williams Iustice, that if it were in the Kings case, he ought to take the next turn which happens, the whole Court accordant in this, that in this case the Grantee ought to take the next turn when it falls, and not to present at any other time when he will, and the words in the Grant, *quandocunq; Ecclesia vacare contigerit*, give him no election or libertie for to present when he will. Williams Iustice, the Grantor here Grants, *donationem, & præsentationem, quandocunq;, & quomodocunq; ecclesia vacare contigerit, pro unica vice tantum*, yet he ought here to take the next presentation, and no other, all which the whole Court agreed cleerely. Flemming chiefe Iustice, as to the latter words of the Grant, that if the Grantee do present, and be disturbed, per eigne Title, or Grants, then this Grant shall remaine in force to be taken the next avoidance, but not otherwise, the whole Court agreed in this. Williams Iustice, the subsequent words in the Grant, are but only an explanation of the words precedent, and these relate unto the next avoidance, and this is of necessitie to be taken, unlesse it be in the case put, of a disturbance, the whole Court accordant in this, *nullo contradicente* that the Grantee ought to take the first which happens to be void, or none, and so the Judgement well given, and by the Rule of the Court, Judgement was affirmed.

Difference between Interests and Authorities, and interests in Land.

Termin. Mic. 8. Iac. B. R. the Iudges argued this case.

Iudgement affirmed per Curiam.

Sir

## *Sir John Ratcliffe* Plaintif, against *Davis* Defendant.

An Action on the Case, for a Trover and conversion entred. Hil. 7. Iac. B. R. Rot. 1217.

AN Action upon the case for a Trover and conversion was brought by Sir Iohn Ratcliffe against Davis, upon not guilty pleaded, the Jury found a speciall Verdict, and upon the speciall Verdict, the case was this, that Sir Iohn Ratcliffe did pawn a Hatband sett with Jewels, unto one Whitlock a Goldsmith in Cheapside for 20. l. and no day certaine set down for the redeeming of the same again, by payment of the money; afterwards Whitlock lying on his death bed, in the presence of Davis his neighbour, commanded his wife for to fetch the hatband, & then delivered the same to the said Davis, wishing him to keep the same safely till the twenty pound were paid, and then to re-deliver the same to the owner, and afterwards makes his Wife his Executrix, and dyes. Sir Iohn Ratcliffe tenders the twentie pound to the Wife the Executrix, who refuseth to receive the same, after which tender made and refusall, Sir Iohn came unto Davis, and demands his Hatband, he having first tendered the money to the Executrix, which he borrowed of the Testator, upon the same, Davis refused to deliver it to him, and upon this his refusall, Sir Iohn Ratcliffe brought his action upon the case of Trover & conversion. It was moved for Sir Iohn Ratcliffe the Plaintiffe, that by this tender of the money to the Wife, and her refusall of the same, this is yet a good redemption in Law of the Pawn, and upon refusall to deliver this by the Bayley, the Action brought against him by the Plaintiffe is maintainable: on the part of the Defendant, it was alledged, that he which had the Hatband as a Pawn, had an interest in it, and that this was in Whitlocke the Goldsmith, upon a certain condition; to be redeemed, but that after the death of Whitlock, this is not then to be redeemed, for that the time is past after his death. Williams Iustice, he may have a Detinue against the one, or the other, for this Hatband, and the denyall to deliver the same, is a conversion in Law, by the Book of 31. E. 3. Executors may redeem a pledge, and this shall be Assets in their hands, and if he which ought for to redeeme a Pledge, offers the money, which is refused, by this tender there is a devesting of the thing pleadged, into his hands againe, and he may afterwards well maintaine an Action for detaining of the same. Yelverton at the Barre for the Defendant, a Pledge cannot be redeemed by any one, but by him which pledged the same, and where there is no time limited for the redeeming of it, he hath only during the life of the party to whom it was pledged for to redeeme the same, and he cannot redeem the same after his death, and if this be adjudged otherwise, in this case it will be the first Judgement that ever was given in this Point, and where there is no time limited for to redeem this, there the Law shall set down the time, and then the extreamest, and longest time shall be, during the life of both the parties. As to the Tender unto the Widdow, whether this be a good Tender, and a good Redemption, the Pledge being in the hands of a third person, 13. R. 2. fo. 13. Brook tit. Pledges Pla. 31. if a man gage his goods, and afterwards is attainted of felonie, yet the King shall not have the goods gaged without paying of the summe for which they were gaged, 20. H. 7. fo. 1. a by Frowike chiefe Iustice in case of a pledge, he to whom the goods are pledged, hath a propertie in them, for the time they are pledged. Williams Iustice, a man pawns goods, after he is outlawed, during this his outlawry he cannot redeem them, and morgaged goods, if they be not redeemed, they shall not be forfeited by outlawry, and if money be tendred to redeem, and a refusall be to deliver them, this hath been adjudged to be a conversion; and so in this Principall case, the Tender and refusall makes a conversion, and gives the Plaintiffe here a good cause of Action, and the Action by him well brought. Croke Iustice, the Action here is well brought by the Plaintiffe, if one do pawn, or morgage goods, and a time certaine is limited for the redeeming of them, there the death of any of the parties, shall not be prejudiciall, the one way or the other, but

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20. H. 7. fo. 1.

1.

*diem et vastum* by his prerogative, the Law hath so confined him, as that he ought to take the benefit of this, presently when it falls, or else he shall lose the same, and if the Law be so in the Kings case, *à fortiori* it shall be so, in the case of a common person, and therefore here in this case, he ought for to present at the next avoidance, or not at all. J. Croke argued on the contrary, in this case the Grantee may present and take his turn when he will, and no mischiefe at all herein: and it is the Office of a Judge, to make the deed to stand according to the words of it, (if the same may be agreeable to the Rules of Law) if the Grant here had been of the nert avoidance, there he ought of necessitie to take the next, but here it is not the next, but *quandocunq; et quomodocunq; Ecclesia vacare contigerit, pro unica vice tantum*, and therefore he may take the same presentment when he will, for it is not here said in the Grant, *quando primo vacare contigerit*, but *quandocunq; vacare contigerit*, and the Grantee here is to have the same in as ample and large manner, and libertie, as the Grantor himselfe had the same, and a difference there will be between Interests and Authorities, and Interest in Land, and therefore if a man grants to another one Crop of his Meddow, *quandocunq;* he will have the same, this is a good grant, and he may take the same when he will, and so in the principall case here he may take his turn when he will, and no mischiefe thereby unto any one. Flemming chiefe Iustice, in this case, if it were not in respect that it is in a Writ of error, it were not worthy of an argument being so cleere a case, by this Grant, the Grantee hath an Interest, and not an Authoritie, and if a man have an interest, if the same be not vested in him, he cannot grant this over to an other: and cleerely in this case, the Grantee ought to take his presentment by force of the Grant at the next avoidance of the Church. Note that Termin. Mich. 8. Jac. B. R. this cause was moved again and argued by the Judges. Yelverton Iustice in this case the Grantee ought of necessitie to present at the next avoidance which happens, or not at all. Flemming chiefe Iustice accords that he ought to take the first presentment which happens, and he hath no election to take any other turn but only the first, when the Church became first void, and by his not then presenting, he by his own Laches, and neglect, hath lost the benefit of his Grant, and so the Judgement well given against him, and not erroneous. Williams Iustice of the same opinion, that the Grantee here ought to take the first presentment at the first voydance of the Church, and if it were in the case of the King he could not do otherwise, but in such a case, he ought to take the first which falls void, or none. Croke Iustice accordant, that of necessitie he ought to take his presentment upon the first avoidance, which happens after the Grant and not any other, nor in any other manner, by force of this Grant made unto him. Flemming chiefe Iustice agrees with Williams Iustice, that if it were in the Kings case, he ought to take the next turn which happens, the whole Court accordant in this, that in this case the Grantee ought to take the next turn when it falls, and not to present at any other time when he will, and the words in the Grant, *quandocunq; Ecclesia vacare contigerit*, give him no election or libertie for to present when he will. Williams Iustice, the Grantor here Grants, *donationem, & præsentationem quandocunq;, & quomodocunq; ecclesia vacare contigerit, pro unica vice tantum*, yet he ought here to take the next presentation, and no other, all which the whole Court agreed cleerely. Flemming chiefe Iustice, as to the latter words of the Grant, that if the Grantee do prelent, and be disturbed, per eigne Title, or Grants, then this Grant shall remaine in force to be taken the next avoidance, but not otherwise, the whole Court agreed in this. Williams Iustice, the subsequent words in the Grant, are but only an explanation of the words precedent, and these relate unto the next avoidance, and this is of necessitie to be taken, unlesse it be in the case put, of a disturbance, the whole Court accordant in this, *nulle contradicente* that the Grantee ought to take the first which happens to be void, or none, and so the Judgement well given, and by the Rule of the Court, Judgement was affirmed.

Difference between Interests and Authorities, and interests in Land.

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20. H. 7. fo. 1.

but

but where there is no time limited, there he which pawns the goods hath during his life, to redeem them, and in this case the death of him, to whom the goods were pawned, shall not hinder the Redemption, but if the partie which pawned the goods dies before the goods redeemed, no other person may then redeem the goods for him, for this should be a very mischievous case, to compell him to keep the goods thus pawned, for such an infinite time, when as he hath paid sufficiently for them, also a lawful tender doth amount unto a good payment, and a refusall for to deliver them afterwards, is a clear conversion, and in this case here was a good tender, and a refusall, and so a good conversion, and the Action by the Plaintiffe well brought. Yelverton Iustice, of the same opinion, he which pawnes goods, and no time appointed for the redemption, he hath libertie during his life, to tender and redeem them, and the death of the partie to whom shall not hinder the redemption, but if the partie himself, which pawned the goods dyes before redemption, his Executor cannot redeem, and so time of the redemption is not determined by the death of him to whom the goods were pawned, but by the death of him which pawned the goods, the time of the redemption is determined by this delivery of the Hatband unto Davis, no manner of interests is hereby passed unto him, but notwithstanding all this, the Interest remaines still in the Wife the Executrix, and Davis hath only the custody of the same, and the Tender and payment to redeem the same, ought to be made to the Wife the Executrix, she may demand the Debt if she will, and the other the Pledge, and so the Action here is well brought. Fenner Iustice accords in opinion, as to the time of Redemption and libertie to demand the Debt, the Tender here is sufficient, and if the other refuseth to receive the same, he may have the benefit to redeeme his Pledge by way of action, if the same be detained from him after the tender, but the other hath no remedie for the money after a tender, and a refusall of the same, in this case there was a good tender to a right person, and a refusall of the same, and then a good demand made of the Hatband, and refusall to deliver the same (which refusall makes a good conversion, and so the Plaintiffe hath just cause of Action, and the Action is well brought. Flemming chiefe Iustice, there is no great doubt in this case, first, it is to be considered,

1. *quid operatur*, by the pawning of this Hatband, or of any other goods, as to this, he to whom goods are pledged, hath a speciall propertie in them untill the money be paid, and he which pawns the goods hath the generall propertie in them, he to whom they were pawned hath a propertie to detaine them untill the money be paid,

2. but without all question, the generall propertie, remaines in him which pawned the goods, and he is not to lose this his propertie by the death of the other, but that he may well redeeme the same. In the next place, it is to be considered, to whom the money is to be paid, to redeem the pledge, as to this, the same is to be paid unto the Executor, who is privie to the Contract, and upon a Tender and

3. Refusall, an Action well lieth, otherwise he may refuse perpetually, and in such a case, if a man takes goods as a Pledge, which are *bona peritura*, at his own proper perill, be it, if he cannot re-deliver them again upon the tender and payment of the money borrowed of him, he which pledges goods generally, hath during his life time to redeem the same. As to the Action here brought against a third person, admitting that the goods pledged, were not delivered over to any other, and the tender is made to the Wife the Executrix, and she refuseth the same, an Action of the Case for a Trover and conversion lieth upon this re-fusall to redeliver the Goods after such a Tender, and the possession here of the Hatband, being in a third person, will not alter the Case for that he hath neither sale, bargaine, nor gift made to him of the same, but he hath only a bare delivery thereof, and this only for the safer custody of the same, and to no other intent or purpose whatsoever: but in the same nature, as he himselfe (who delivered the same over) had it and this delivery over by him, to Davis, was in *articulo mortis*, and here this remains still a pawn in him to whom the same was pledged, but if he had there said thus unto him, take you those goods which are pawned unto me, give you the money to my Wife my Executrix, and you shall have the same againe of him which owes

the

the Pawn, and pawned the same to me, if this especiall matter had been thus found, then it would have been otherwise, and the Tender should then have been to such a Bailey, and such a Tender then to the Executor would not have been good, but it is not so in this principall Case here, and therefore the Tender here was well made, and the refusall, a conversion, the Debt here is not transferred over unto the Bayley, but only the bare possession of the Pawn delivered to him, and in respect of the possession only, the title in the thing pledged, but this only safely to keep, and therefore the Tender here made to the Wife the Executrix, was well made, and as the same ought to be, and so the tender well made, and sufficient, and as to that which had been said, that if he paid the money to the Wife the Executrix, that he ought to make his claime to the third person, this is not requisite to be done, for that no propertie was at any time out of the first person to whom the Pawn was made, but when he had made his tender, and afterwards comes again to him, who had the possession delivered to him, as he ought to doe, and tells him, that he had made tender of the money which was refused, and prayes delivery of the pledge, and he refuseth to deliver the same, this refusall is a conversion, but yet notwithstanding the refusall of the Executrix to receive the money, being tendred, the Debt still remains a Debt, and for the which an Action of Debt well lieth, though the money were refused upon tender, and the same is not lost, no more then in case of an Obligation, but he ought still to be ever ready to pay the same, and so upon the whole matter, the action is here well brought by the Plaintiffe, and by the Rule of the Court, Judgement was entred for the Plaintiffe.

Judgement by the Court for the Plaintiffe.

## *John Walter* Plaintif, against *Edward Bould* Defendant.

A Writ of error to reverse a judgement the C. B. in an action of trespasse and ejectment entred. Tr. 5. Iac. B.R. Rot. 922.

IN a Writ of Error to reverse a Judgement given in the Common Bench, in an Ejection firme brought there by Bould against Walter, and upon the generall Issue pleaded by the Defendant, the Jury found a speciall Verdict, the effect of which Verdict was that John Bourcher, Lord Barnes being in debt to King Hen. 8. in 500. l. and seised in fee of the Mannor of Haughton, to which the Advowson of the Church of Haughton was appendant 12. Aprilis 5. H. 8. suffers a common recovery of the said Mannor, and this was to the use of himself in fee, and after the Recoverors in performance of certaine Covenants contained in certaine Indentures of Covenant, dated the 22. of April 23. H. 8. and made between the said Lord Barnes of the one partie, and Iames Bourcher his Sonne of the other partie, by Feoffement bearing date 4. Maij 24. H. 8. did grant the said Mannor to the said Iames Bourcher, and others & to their heires, to the use of the said Iohn for his life, the remainder to the use of the said Iames, and the heires of his body issuing, the Reversion to the said Lord Barnes and his heires for ever: afterwards Iohn Bourcher, Lord Barnes by his will in writing dated in March 24. H. 8. deviseth *in hac verba* as followeth, I humbly intreat the Kings Majestie after the death of the Lady my Wife to accept of the Mannor of Haughton and Doxey for the five hundred pound which I doe owe his Grace, paying for the premises, to my Executors over and above the said 500. l. so much money as it shall please his Highnesse towards the performance of this my last will, and afterwards 19. Martij 24. H. 8. he died, and 12. Martij 27. H. 8. the Lady Barnes died, afterwards James Bourcher (the Church being then full of one Webbe) 20. Martij 35. H. 8. grants *primam & proximam advocationem al Littleton, & Littleton*, and 20. Februarij 36. H. 8. he grants *primam & proximam advocationem*, to Edward Bould and Philip Bould, and the 20. of February 38. H. 8. dyes, having Issue Ralph Bourcher, and afterwards 1. E. 6. the King by his Writ reciting the said Will, commands the Sheriffe of the Countie of Stafford to enquire of the decease of the Lord Barnes, and of Dame Barnes his Wife, and what persons have intruded, and to seise the said

said Mannors into the Kings hands, which Writ was executed accordingly, and then Webbe, the Incumbent, dyes, after whose death, Littleton, & Littleton present Brett. who was inducted and inductment. Ralf Bourcher the issue in tayle, 14. July 6. E. 6. grants *primam & proximam advocationem* to Edward Bould and Philip Bould the 16. of October 1. & 2. Mar. Ralph Bourcher sues his ouster le maine Brett. demiseth the Rectory *cum pertinentiis* to Humphrey Walter per 80. ans Ralph Bourcher 20. Jan. 3. El. and the Ordinary 18. Ia. 4. El. confirmes the Lease, afterwards Edward Bould dyes, after Brett the Incumbent dyes, and Philip Bould the Survivor by force of the second grant of James Bourcher presents Nowell who was instituted and inducted, and 31. Mai. 19. Eliz. dyes, and Philip Bould presents Falkoner by reason of the Grant of Ralph Bourcher who was instituted and inducted. Humphery Walter 9. January 40. El. 2. grants all his estate in the Lease of 80. years to Iohn Walter and Edward Bould as servants unto Falkoner, takes the Tithe Corne, set out by the owners, and Iohn Walter brought the Action, *& si, &c.* and upon this speciall Verdict, after divers Arguments in the C. B. Judgement was given for the Defendant against Walter, and for to reverse this Judgement, Walter brought his Writ of Error in the B. R. Yelverton at the Barre argued for the Plaintiffe in the writ of Error, that the Judgement given in the C. B. is erroneous, and so to be reversed. The first Error assigned, was in the entrie of the Judgement in the C. B. for the entrie of the Judgement upon the Rolle is, *quod judicium datum fuit die Jovis proxim. post Octab. Sancti Hillar.* and this was the Essoine day, being the day before the Terme begins, and so not a day in Court, on which day a Judgement could be given, there being not there, on that day any Court for to give a Judgement, and so the Judgement then given for this cause is erroneous. The second Error assigned, was the matter in Law, in which 3. Points are considerable, which were all of them argued in the C. B. The first Point was, when Tenant in Taile grants the none avoidance and dyes before the Church becomes void, whether this Grant be determined by his death or not, that it is not, and that for 2. Reasons, First, that this is parell of the thing intailed, the which may expect a confirmation to be made, and so by this to be made absolutely good, for when Tenant in Tail makes any grant of the thing it selfe intailed, this grant is not void by his death, for that the same may be made good, the same is only voidable, otherwise it is of a thing granted out of an entailed thing, as of a Rent granted out of Land intailed, this grant is void by the death of the Grantor Tenant in Taile, and the same can never after be made good, and this Advowson here is parcell of the thing intailed, to wit, of the Mannor, and the next avoidance, is parcell of the Advowson, and so parcell of the thing intailed, and therefore the grant of this by Tenant in Taile is not absolutely void by his death. If Tenant in Taile of a Rent Service, grants this for life, or in Fee, and dyes, the Grant is not determined by his death, but determinable only, but if the grant had been here determined by his death, yet in as much as the Jury have found the grant, and that Littleton the Grantee presented Brett, who was admitted, instituted, and inducted upon this presentment, this being a presentment upon a Grant, which was intended to be a Lawfull grant, and the Grantee doth not claime any other Title, but present only by force of this Grant, and admission, induction is had accordingly, this is no usurpation, for that his presentment doth not operate otherwise then according to his claime, the interest shall be vested in the party according as his claime is. If an Infant purchaseth Land, his Father enters, and claimes to hold this as his Gardian, by cause of Nurture, he shall not be adjudged a Disseisor, for by his claime he did not intend to do any wrong, and he shall not be in otherwise then as his claime is. If the King presents to a Church in the right of his Ward, whereas the Ward had no right at all, this shall be taken to be in the right of the Ward, and not by this to make him a usurper, or wrong doer, and so in the principall case here, when the grantee presents here by force of his grant, he shall not be said to present as a usurper, this being against his expresse claim, and herein the difference will be, where a man doth a thing by force of

Errors assigned.

1. Because judgment was given upon the Essoyne day.

2.

1.

1. Note the difference where the grant of Testator in taile is void by death, and where but voidable.

Nota the difference where the grant is of part of the thing which is intailed, and where not.

Nota, the difference where a man acts by force of a void grant and where voidable.

of a Grant which was void *ab initio*, and when by force of a Grant, the which was good at the first, but afterwards void by matter subsequent, or *ex post facto*, where the Grant is void at the beginning, there a claime by reason of this, will not qualifie the wrong done, but here in this case Littleton presents by force of a Grant which was good at the first, and therefore by this he shall be no usurper, and so the Issue in Taile is not put out of his Patronage, but that he may well confirme the Lease made by Brett unto Walter, and so by this confirmation, the same made a good Lease. The Second Point being *quid operatur*, by this second Grant of the next avoidance unto Bould, and Bould, wherein the question considerable is, when Tenant in Taile grants the next avoidance unto Bould, and dyes, and the Issue in Taile afterwards grants the next avoidance of the same Church unto the former Grantee, whether this be not a surrender of the first Grant, as to this, admitting that the first grant was not determined by the death of tenant in tail by the taking of the second Grant, the first is by this surrendred, and extinct, for where two present Interests come together under one and the same Title, the first shall be extinct, and determined, as if Lessee for years takes a second Lease, by this the first Lease is surrendred, and extinct, so in this principall Case, if the grant to Bould by the father, Tenant in Taile be good, the acceptance of a second Grant by him, from the Issue in Taile, this is a making void of the first Grant. As to the Third Point, which is the great question in this Case, *quid operatur* by the Seisure, by force of the Commission out of the Exchequer, whether this Seisure by the commission out of Exchequer, being grounded upon a void will, shall gain any thing to the King, as to this, the King may well take by this Will. The Objection against this is, That the King can take nothing unlesse the same be recovred, he can take nothing but by matter of Record; As to this it may be Answered, that here the Will is found upon Record, and therefore this is good, and here the Office is only an Office of Instruction, for all the Title of the King appears here in the Commission out of the Court of Exchequer, the same being for to make enquiry of the things devised, and the King may well take by the devise, as appears by the Judgement de Court de Wards from the time of E. 6. till this day, for upon this very Will now in question, which was made in the time of E. 6. and a seisure was then made by Commission of the Lands devised, and they could never be had out of the Kings hands, and by Stamfords Prærogativa Regis, fo. 79. if a Title appears for the King by Office, or by any other matter of Record, the Officers may seise for the King, when they perceiving his title, & then upon this seisure, the possession of the Land being transferred to the King, then by this the partie is put out of possession, and then the Issue in Taile grants the next avoidance when the possession is out of him, this Grant is void, and although the hands of the King were afterwards amoved, yet the Grant shall not be made good by Relation, If a Disseisee be of a Mannor to which an Advowson is appendant, Grants the next avoidance and after enters into the Mannor, this shall not make the Grant good, so if a Disseisor Enfeoffes A. & B. and makes Livery unto A. A. grants a Rent-Charge, and dyes, B. disclaimes, this shall vest the Land in the Heire of A. *ab initio* by the Relation, but yet it shall not Relate to make the Grant of the Rent-Charge good, no more shall the Grant of Issue in Taile, made during the possession in the King be made good by Relation, after the Kings possession is amoved by an ouster le maine, and so this Judgement here given is erroneous, and to be reversed. Wincoll, the Judgement was well given, and to be affirmed. First, Where Tenant in Taile of an Advowson, grants the next Avoidance, and dyes, whether this Grant by his death, is determined by the Common Law? the same Grant is void by his death, but now since the Statute of 32. H. 8. cap. 36. if a Fine be levied of an Advowson, or of other things which lye in Grant by Tenant in Taile, this is not void by the death of Tenant in Taile, but that after Proclamation, the Issue shall be bound by force of the Statute, for by this Statute of 32. H. 8. cap. 36.

2.

3.

*Object.*

*Resp.*

1.

Stat. 32. H. 8. cap. 36.

36. Tenant in Taile is enabled to alien, the which he was restrained to doe before, by the Common Law, for by the Common Law, a Grant made by Tenant in Taile, of things which doe lye in Grant, the same is void by his death, unlesse it be in the case of a fine by him levied, here in this Case, Tenant in taile grants the next avoidance to Littleton, and afterwards grants the the next avoidance to Bould, and dyes, the Issue in Taile grants the next avoidance unto Bould, Littleton presents Bret, he by this is a usurper, for the Grant was not by fine, and so void by the death of tenant in taile, the Grantor, and so by this usurpation the right of estate, is now made a right remediless, for the tenant in taile came to this by purchase, and no presentment were had by him, and the sixe monethes being past, the Issue in taile hath no remedie to recover the presentment, and Patronage, and so Littleton hath gained the Patronage for ever, and then the Confirmation made by the Issue in taile of the Lease made by Bret, the Presentee of the Usurper, is void, for that he had nothing in the Patronage, & so when Bret dyes, his Lease is void & determined, & then the Lease of Falkoner in the end of the Case will be good. As to that which was alledged, that Littleton should be no usurper, because that he presented by force of the Grant made unto him, to this the Answer may be, that the Presentation is after the death of tenant in taile who made the Grant, and then he could not present, in right of the Grant made unto him by the tenant in taile, for he was then dead, and by his death, the Grant was void, and determined, and he doth not present in the right of the Issue in taile, and therefore of necessitie he must be a Usurper when he presents by force of a void Grant, for he cannot qualifie his own wrong by his Claime. As to the Second Point, Whether the Seisure, by force of the Commission for the King without any title, by a false Office, shall prejudice him, which is in possession, that it shall not, and therefore the difference will be this, if an Office be found by the Escheator, *virtute brevis*, an Entrie by this is given to the King, and this shall binde the partie untill the same be avoided. But otherwise it is, if the Escheator finde an Office *ex officio*, *virtute officii*, and without any Writ, and this is false, this shall put no man out of his possession, neither doth the King by this gaine any interest at all, as appears, Coke 5. pa. fo. 53. in Pages Case. Thirdly, As to the Error assigned, being the Entrie of the Judgement upon the Essoine day, being no Judiciall day, and so not good, but Erroneous, as to this, the Judgement was well given, and so not erroneous, for a Judgement may well be given on any day within the foure dayes, proclamation being made according to the Statute of 32. H. 8. cap. 36. touching fines, ought to be made after the fourth day, for where these proclamations are made, all Pleas are to cease, which is intended to be after the fourth day, but thefoure first dayes are dayes of grace, but yet the Terme begins the first day of these four dayes, and therefore in 2. R. 3. fo. 15. in a Writ of right, the Tenant comes with his Champion the first day, ready for Battaile, the Court ought to admit of this, as if it had been after the fourth day, and to give Judgement upon this, as if the same had been on the fourth day, or after, so here in this Case, Le Judgement being given in this *ejectione firme*, upon the Essoyn day, is well given, and so to be affirmed. Yelverton al Barre, that the Judgement is Erroneous, and to be reversed, agrees that in an Assise, the adjournment ought to be to a speciall day, but here it is upon a Judiciall Writ, and therefore in this the Judgement ought to be given *sedente curia*, as in the Case of a Proclamation upon a fine, the Pleas are to cease, therefore the Court is to be sitting, and as to the Case of Ley Gager, it is materiall on what day that is. Williams Justice, if a Stranger usurpe upon the possession of of the King, and his Incumbent makes a Lease, this Lease is good till it be avoided. Flemming chiefe Justice, if the issue in taile, during the possession in the King, Grants, the nert in taile hath Livery by on ouster le mayne, and then confirms the Lease made by Bret the Incumbent of Littleton, the Grantee of tenant in in taile, and afterwards Bould the Grantee of the issue in taile presents, this doth put the issue in taile out of possession of the Estate, and yet his confirmation before doth strengthen the Lease made

*Object.*
*Resp.*

2. Note the difference where an Office is found by the Escheator *virtute brevis*, and where *ex officio*, without any Writ.

3.

made by Bret. Williams Iuſtice, In this caſe, *quacunque via data*, there is a Uſurpation upon the King. Geo. Croke, that the Judgement is erroneous, and to be reverſed, and that in reſpect of the time when the judgement was given, the ſame being out of the Terme, and ſo the Judgement erroneous, and this to be ſo, appears by the Stat. of 32. H. 8. cap. 21. which orders the Returns of Trinity Terme, and the beginning of the ſame Terme perpetually; As to the keeping of Eſſoynes, Profers, Returns, Appearances, and to begin the Munday next after Trinity Sunday, whenſoever it ſhall happen to fall, and that the full Term of Trinity Terme ſhall yearly for ever begin, and take his commencement the Friday next after Corpus Chriſti day. Williams Juſtice, the King hath no remedy, if a Uſurpation be made upon him after ſix moneths paſt, he hath no remedie, neither by writ of Right, nor yet by a *Quare Impedit*. If an Advowſon be appurtenant to a Mannor by the Grant of the Mannor *cum pertinentiis*, the Advowſon paſſeth, but by the grant of an Acre of Land parcell of the Mannor, *cum pertinentiis*, the Advowſon doth not paſſe. Flemming chiefe Juſtice, If Tenant in Taile be of a Mannor, to which an Advowſon is appendant, the Church being full, and he grants *proximam advocationem*, and then dyes, by his death, this grant is meerly void, and in this the Court agreed. And ſo without any further Argument this Caſe was adjourned, for the Court further to adviſe upon, and afterwards an end was made between the parties by agreement.

Stat. 32. H. 8. cap. 21. for Trinity Term

This caſe ended by agreement between the parties.

Nota, That at another time, the queſtion before the Judges was, whether a Judgement given on the Eſſoine day, be good, or not. Williams Iuſtice, a Judgement may be well given on the Eſſoine day, and ſo it was held in a caſe which was in this Court. Hill. 6. Iac. B. R. Rott. 1341. and Buckley was one of the Parties alſo, a man may plead any Plea on the Eſſoine day, and herein the difference will be between Returnes, and the Teſte of Writs. A Return may be on the Eſſoine day, a Writ ſhall not abate, if the Return be, *quarto die poſt*. In an Aſſiſe between the parties not demandable before *quarto die poſt*, as appears in 12. H. 4. fo. 24. pla. 10. the queſtion may be, to what day a Judgement given in full Term ſhall have relation, whether to the Eſſoine day, or to the day in full Term. Flemming chiefe Iuſtice, If it be not in a Writ of Right, no man is demandable before *quarto die poſt* by intendement of Law, all the Judges ought to be there ready in Court the firſt day, and ſo they uſed to do in ancient time, and ſo the Caſe of Inſpection of an enfant taken in Court by Croke Iuſtice on the Eſſoyn day, was adjudged good, the which was one Poynes caſe, who was by him ſuſpected, and the Judgement upon the ſuſpection by him given upon the Eſſoine day, was ruled by us all to be a Judgement well given, and this proves that a Judgement given in full Term, ſhall have Relation to the firſt day, that is, to the Eſſoin day, by our affirmance of the ſaid Judgement, upon the inſpection, which could not be good, if it related not to this time, and therefore he held ſuch a Judgement given upon the Eſſoin day, to be a good Judgement, and well given, and that the Judgement ſhall relate to the firſt day, the Defendant is not demandable before the *quarto die poſt*, but he may appear if he will, the firſt day, and Judgement ſhall be then given, but no Judgement ſhall be given upon his default, before the *quarto die poſt*. It hath been the generall opinion of all the Lawyers, and Practiſers in the Town, that a Judgement cannot be given upon the Eſſoyne day, nor yet to have Relation to the firſt day, being given in the full Terme, but he would have them all to know, that in this, they are all of them in an error, and as to the Relation of a Judgement given in full Term unto the firſt day, the Eſſoine day, which is the Eſſentiall day of the Terme, and the other dayes are but dayes of grace, and to prove this, there is a notable caſe in 22. E. 4. Fitz. tit. Jour. pla. 39. where it is ſaid, where a Judgement is given upon a default in any Record, *quarto die* is the day, and this is the day of Grace before which day, no default was to be recorded, and ſo is the entre, *obtulit ſe quarto die*, but where Judgement is given upon appearance, there the entrance is, *ad quam quidem diem*, and there the Judgement hath relation to the firſt day, and is a Judge-

Whether a Judgement given on the Eſſoin day be good or not.

Difference between returns and the Teſte of writs.

To what day a judgement in full terme ſhall relate.

*Poyns Caſe.*

A judgement given upon the Eſſoyn day wel given

ment given by appearance. Croke Iuſtice, If a man be bound to appear the firſt day of the Term in Court, he may appear the firſt day of the Eſſoynes, and then have his appearance recoꝛded, and this is good, and this caſe was agreed foꝛ good Law, by the whole Court, and ſo the Court did all agree in this cleerely, *nullo contradicente*, that a Iudgement may be well given on the Eſſoin day, and that a Iudgement given in the full Terme, ſhall have relation to the firſt day of the Term, *quod nota.*

## *Haſtings* Plaint. againſt *Beamount* Defendant.

*Haſtings* plan. againſt *Beamount* defend. in an action upon the caſe for words.

IN an Action upon the Caſe foꝛ ſlanderous woꝛds ſpoken by the Defendant of the Plaintiff, being then a Iuſtice of the Peace, the woꝛds were theſe, you, meaning the Plaintiffe, out of malice and ſpleen, have peꝛveꝛted Iuſtice, and have wꝛeſted the Law many times foꝛ to ſeꝛve youꝛ own turn, upon not guilty pleaded, the Iuꝛy found foꝛ the Plaintiffe, the Defendant moved in Aꝛreſt of Iudgement, that the woꝛds will not beaꝛ Action, foꝛ that it ſhall be intended the woꝛds were ſpoken, beꝛoꝛe he was a Iuſtice of Peace, and ſo not Actionable. Williams Iuſtice, if theſe woꝛds will not beaꝛ an Action, none will, they aꝛe cleerely ſcandalous, and that in a veꝛy high degꝛee, and ſo actionable, it is heꝛe laid in the Declaration, that the Plaintiffe, Haſtings, of whom the woꝛds were ſpoken, was a Iuſtice of the Peace, and that then, *ad tunc*, the Defendant did ſpeak the woꝛds of him, upon which the Action was bꝛought. The whole Court was cleeꝛe of opinion that the woꝛds aꝛe cleerely actionable, and ſhall be intended to be ſpoken of him, when he was a Iuſtice of Peace, and ſo then, he was a peꝛſon able to peꝛveꝛt Iuſtice, and not to be intended, as the Counſell of the Defendant would have it, that the woꝛds were ſpoken beꝛoꝛe he was a Iuſtice of the Peace, the Declaration it ſelfe being otheꝛwiſe, and theꝛefoꝛe by the Rule of the Court Iudgement was entꝛed foꝛ the Plaintiffe.

Iudgement given for the Plaintif.

## *Fountaine* Plaintiffe againſt *Grymes* Defendant.

*Fountain* pla. againſt *Grymes* defen. entꝛed Mich. 7. Iac. B. R. Rot. 197.
Stat. 37. H. 8. cap. 9. & 13. El. 2. cap. 8. againſt a Iuꝛy

FOuntaine Plaintiffe againſt Gꝛymes Defendant, in an Action of Debt upon a Bond foꝛ 100. l. the Defendant in avoidance of this, pleads the Statute of uſuꝛy, and upon the Statute of 37. H. 8. cap. 9. and of 13. Eliz. cap. 8. againſt uſuꝛy, the caſe was this. The Defendant comes to the Plaintiffe to boꝛꝛow money, theꝛe was communication between them of boꝛꝛowing, and lending, 100. l. the Plaintiffe refuſed to lend him any money upon Intereſt, but ſaid he ſhould have a 100. l. if he would enteꝛ into a Bond, conditioned foꝛ the payment of 20. l. a yeaꝛ unto him, by way of an Annuity, and this payment ſo to continue foꝛ theꝛe lives without any pꝛoviſion, oꝛ mention at all made foꝛ the ꝛepayment unto him of the 100. l. pꝛincipall money. The queſtion was, whether this caſe be within the Statute of uſuꝛy, to make this Bond void oꝛ not. It was objected, that ſuch a communication, and the lending of 100. l. theꝛeꝛeupon, was within the Statute made againſt Uſuꝛy, and againſt Coꝛꝛupt, and Uſuꝛious Contꝛacts and agꝛeements, notwithſtanding theꝛe was no certain agreement, to have any ꝛepayment made of the pꝛincipall 100. l. to him again, and though the ſame were neveꝛ paid, yet the ſame ſhould be within the Statute, foꝛ that this was only a tꝛick, and a ſhift, to avoid and defeate the Statute, the which by this means is not to be defeated, and it ſhall be ſaid to be Uſuꝛy, and within the Statute, by ꝛeaſon of the one paꝛties coming to boꝛꝛow money, and upon the otheꝛs offeꝛing to lend money upon this coꝛꝛupt communication, this is theꝛefoꝛe a coꝛꝛupt Annuitie contꝛacted, and agꝛeed to be yeaꝛly paid, foꝛ this 100. l. upon this coꝛꝛupt communication, and agꝛeement to boꝛꝛow, and lend 100. l. in this manneꝛ, and this is within the Statute, though the 100. l. were neveꝛ paid again, and ſo, (as it was uꝛged) it hath been

been adjudged here in this Court before. But by Williams, Yelverton, & Fenner Iudges, this is no corruption nor uſury clearly within the Statute of Uſury, the ſame being only a contract bargain, and agreement, for a yearly Annuity for a certaine time, and for a ſumme of money, but otherwiſe it would have been, if there had been any proviſion made for the repayment of the ſaid 100.l. unto him within any certain time, and in the mean time the yearly payment of the 20.l. Annuitie to continue, this had been clearly a uſurious agreement, and lending within the Statute, but this caſe is not ſo, and therefor not within the Statute, and the action being brought by the Plaintiffe upon the Bond, againſt the Defendant, for not paying of the ſaid Annuity, is well brought, and ſo by the Rule of the Court, Judgement was entred for the Plaintiffe.

Iudgement for the p'laint.

## *Barker* Plaintiffe, againſt —— Defendant.

IN a Writ of Error to reverſe a Judgement given in the C. B. for to reverſe the Judgement, this was alleadged for Error, that at the time of the Judgement given, the partie againſt whom Judgment was given, was then an Infant, and within age, and ſo the Judgment given againſt him was erroneous, *& hoc paratus eſt verificare, prout curia vult*, it was urged, that this was no cauſe to reverſe the Judgement, for that by this their plea, the matter is put into the notice, and Judgement of the Court, of which the Court can take no Conuſans, and by the Book of 24. E. 3. where it is Adjudged, that the Court is not to take inſpection of the age, but where the partie is of full age, and not where he is within age. And as to the Allegation, that he was within age at the time of the Judgement given, *& hoc paratus eſt verificare, prout curia vult*, and to this the other pleads in *Nullo eſt erratum* by the Court, this is a good Plea, for it lieth not in the breſt of the Court to know whether he be within age, but if he had concluded, *& hoc paratus eſt verificare*, only this had been good and traverſable, and to be tryed by the Countrey, ſo by the Rule of the Court Judgement was affirmed.

*Barker* plaint. againſt —— in a Writ of error for to reverſe a judgement given in the C. B.

Iudgement affirmed by the Rule of the Court.

## *Lynker* Plaintiffe, againſt *Stanwell* Defendant.

IN a Writ of Error for to reverſe a Judgement given in the C. B. in an Action upon the caſe for words, the words were theſe, ſpoken by the Defendant there of the Plaintiffe. Theſe, Murderer, Bloodſucker, Villeine, Rogue, and Banckrout upon not guilty pleaded, a Verdict was found for the Plaintiffe, and dammages given. Iudgement upon this given for the Plaintiffe, and a Writ of error brought for to reverſe this Iudgement, the error aſſigned, and inſiſted upon, was this, for that there were divers words ſpoken, ſome of which were actionable, and ſome of them not, and the Jury have given entire dammages for all the words in generall, and therefore not good, and ſo the Judgement given according to this Verdict, is Erroneous, and ſo to be reverſed, the whole Court agreed in this, that ſome of the words are Actionable, and ſome of them not ſo, and that the dammages given by the Jury, in generall ſhall be ſaid to be given for the words which are Actionable, and not for the other words, and ſo the Judgement well given, and ſo by the Rule of the Court, Judgement was affirmed.

A writ of Error to reverſe a judgement in the C.B. in an action upon the caſe for words entred Trin. 7. Iac. B.R.Rot. 1617.

Iudgement affirmed per curiam.

## *Aſcot* Plaintiffe, againſt *Hender* and *Molſworth* Defendants.

IN a Writ of Error to reverſe a Judgement given in the C. B. in an Action of Waſte, where the Plaintiffe in the Action of Waſte did aſſigne the Waſte to be done

A writ of error to reverſe a judgement in the C.B. in waſte entred, Trin. 7. Iac. B.R. Rot. 1113

done in a Parlour, a Hall, a Kitchin, and a Smiths Shop, upon the pleading of no Waste made, the Jury found for the Plaintiffe, that the Waste was done in these places assigned in the Inquisition, and also in a Dovehouse, not named, nor assigned by the partie Plaintiffe in the Inquisition, and did give dammages for the whole, and the Judgement given accordingly, and so in this erroneous, and this assigned for error to reverse the Judgement, and the Book of 2. H. 6. was cited, where in an Action of Trespasse the Plaintiffe counts of dammages done him, to the value of 10. l. the Jury found for the Plaintiffe, and gave 15. l. dammages, and Judgement given accordingly for the 15. l. it is there said, that he shall have no more by his recovery, then he found himselfe to be grieved for, so in this case here in finding of the Jury, and Judgement given to recover dammages for the waste done, in a place not assigned by the Plaintiffe, the Judgement for this cause is herein erroneous, and therefore they having exceeded their Authoritie, and the directions given them by the inquisition, as touching the finding by the Waste, and the Jury having found the Waste done in the places by the Plaintiffe assigned, and in another place also not assigned, and they giving of dammages for all, and the Judgement so given accordingly, this is erroneous, and so to be reversed. The Court cleere of opinion, that this finding by the Jury, and judgement given for dammages in the the Waste done in the Dovehouse, and the same not assigned by the Plaintiffe, as to this part the Court cleere of opinion, that the judgement is erroneous, and so by the Rule of the Court, as to this part, the judgement was reversed.

The Iury give dammage for wastes done in the places assigned, and also for waste done in a place not assigned by the Plaintiffe in this erroneous

Judgement reversed by the rule of the Court, for that part where the waste was not assigned.

## *Wolverton* and his Wife Plaintif against *Davis* Defendant.

*Wolverton* and his Wife *Plaintif against Davis* Defendant, an action upon the Case for a promise entred. Trinit. 7. Iac. B. R. Rot. 1196.

IN an Action upon the Case for a Promise, and the Case appeared to be this, The Defendant in consideration of a 100. l. to be paid unto him by the Plaintiffe, did assume and promise to enfeoffe him of certaine Lands, upon request made by him, the 100. l. is paid accordingly by the Plaintiffe to the Defendant, and a request made by him to the Defendant to enfeoffe him of the Land according to his, promise but he refused to make the Feoffement, and upon this the Plaintiffe brings his Action upon the Case for breach of promise. The Defendant pleads that he had enfeoffed him of the Land, before the Action brought, and that the Plaintiffe had accepted thereof in full satisfaction, and discharge of all, and yet contrary to his own acceptance he hath brought this Action, & so he demands the judgement of the Court, by his Counsell, whether this his acceptance of the Feoffement did not go in full discharge of all. Williams Iustice, the acceptance in full discharge of the dammages which he was only for to recover in this Action, and if a wrong be done to another, as by taking away of his Horse, after the delivery of his Horse again to him, and acceptance of him by the party, from whom the Horse was taken, notwithstanding this taking of his Horse again in this manner, yet an action for the wrongful taking away of his Horse, doth remain unto him. Yelverton Iustice, if in this Case he performes not his promise, he can for this recover nothing but dammages, and if afterwards he enfeoffes him in consideration of the dammages, and he accepteth thereof, this now is in full discharge of the dammages, this being so done, performed, and accepted of by their mutuall agreement here in this case, the Plaintiffe by the not performance of the promise by the Defendant, in making of the Feoffement upon request, hath his Election, either to bring his Action, for to recover his dammages, for breach of Promise, or else for to accept of the Feoffement in discharge of the dammages, the which he hath here accepted of, and this in all likelihood, a better bargaine for him, then the dammages would have been, for he ought not to have both the Land and dammages also, and it is here laid in the Barre, that he had accepted of the Feoffement in discharge of the dammages, and this the partie Plaintiffe

tiffe could not deny, and therefore if one doth promiſe to aſſure unto another certain Land, at Michaelmas next coming, and at the time he doth not make an aſſurance according to his promiſe, for this breach of promiſe the partie may well have his Action, and recover dammages, but if afterwards upon conference had between themſelves, it is agreed that if the aſſurance be made, he will take no benefit by way of Action for the firſt breach, if the aſſurance be made according to this ſubſequent agreement, this is good, and the other cannot have any Action for the firſt breach, the ſame being diſcharged by the ſubſequent performance, by the latter agreement, and ſo it ſhall be here in this principall caſe; but where it is in a Caſe of Debt, upon an Obligation, there ought to be ſuch a Diſcharge, as may amount unto a full diſcharge of the Action it ſelfe, or elſe it ſhall not be good, but where it is not in Debt, as in this principall Caſe, there a good and ſufficient diſcharge may be of the Action, by ſuch agreement as is here ſet forth in this Caſe, the Action being only for to recover dammages for the breach of a promiſe. Flemming chiefe Juſtice, if in this principall caſe the Plaintiffe had not accepted of this Feoffement, by the ſubſequent agreement in full diſcharge of all, of the Action accrued unto him, and of the dammages for the breach of promiſe, the ſame had not then been diſcharged by the ſole and bare acceptance of the Feoffement, after the breach, but this acceptance, as it is in this Caſe, ſhall not only be a qualification of the dammages, but as the caſe here is the ſame ſubſequent acceptance of the feoffment, is a good diſcharge of the dammages. Croke Iuſtice, by this acceptance of the feoffment, by the Plaint. from the Defendant, the Action for the recovery of dammages is cleerely diſcharged. Williams Iuſtice, where a promiſe is made to Husband and Wife, the Husband alone, may very well diſcharge the ſame, and that by word, as it hath been adjudged. Fenner Iuſtice, this acceptance of the Feoffement by the Plaintiffe is a cleere diſcharge of the dammages, and ſo by the Rule of the Court Judgement was given for the Defendant, that this acceptance of the feoffement ſhall operate and enure as a full and plenary ſatisfaction, and diſcharge of all the dammages which were to have been recovered, in and by the ſaid Action, and therefore the judgement of the Court was *quod querens Nil capiat per Billam.*

Judgement by the Court for the Defendant, *quod querens nil capiat per Billam.*

## *Dale* Plaintif againſt *Copping* Defendant.

IN an Action upon the Caſe for a promiſe, the Caſe was this, the Defendant did promiſe to pay ſuch a ſumme of money to the Plaintiffe for a Cure, in conſideration that he would cure him of the Falling-ſickneſſe, he promiſed to give him ſo much, and ſayes in fact that accordingly, he had cured him, and for not payment of the money, according to his promiſe the Plaintiffe brought his Action. The Defendant pleads this in Barre, that at the time of the promiſe made, he was within age, and ſo demands Judgement of the Court, whether the Plaintiffe ſhall have this Action againſt him. Williams Iuſtice, cleerly the Action well lyeth againſt the Defendant, and this none-age by him alledged at the time of the promiſe made is not materiall, for that this ſhall be taken as a contract, and that to be for a thing in the nature of neceſſitie to be done for him, and the ſame as neceſſary as if it had been a promiſe by him made for his Meat, Drink, or Apparell, and in all ſuch caſes his promiſe is good, and ſhall binde him, although he were within age at the time of his promiſe made for ſuch neceſſaries, and his nonage not at all materiall, and ſo in this caſe, here his promiſe ſhall aſwell binde him, as in the other caſes, the reaſon of the Law being the ſame, and this Cure being of as great neceſſitie for him, as any of the other, and ſo the Court cleere of opinion that the Action was well brought by the Plaintiffe, but they would not overrule the ſame, but left it to the Plaintiffe to demurre in Law unto this plea of the Defendant. Williams Iuſtice, there is no Book caſe in this, the Court declared their Opinions, that the Plea in Barre of the Defendant was not good, but no judgement was given in this caſe for the Plaintiffe, becauſe there was no demurrer by him to the Plea, the parties

*Dale* Plaintif againſt *Copping* Defendant. An action upon the caſe for a promiſe againſt an Infant to pay money for curing him of the falling ſickneſſe, this ſhall binde him.

The opinion of the Court for the Plaint. ended by agreement.

parties perceiving the opinion of the Court, the same was ended between them by agreement.

## *Smale* Plaintif, against *Hammon* Defendant.

*Smale* plaintif against *Hammon* Defend. An action upon the Case for words.

IN an Action upon the Case for slanderous words spoken by the Defendant of the Plaintiffe, the words were these, Thou wert forsworn, and I can prove thee forswore when I will, upon not guilty pleaded, a Verdict for the Plaintiffe, and dammages moved in arrest of judgement, that the words are not actionable. Williams Iustice, this Rule is to be observed, as touching words which are Actionable, that is to say, where the words spoken do tend to the infamy, discredit, or disgrace of the partie, there the words shall be actionable, and this Rule was affirmed by the Court, and in this principall Case the words are actionable, and judgement given for the Plaintiffe, *per curiam*.

Judgement given for the Plaintif.

## An action upon the Case for words.

An action upon the case for words, Thou wert in the Goale for robbing such a one on the high way.

IN an action upon the case brought for slanderous words spoken by the defendant of the Plaintiffe, upon not guilty pleaded, a Verdict was found for the Plaintiffe, The words were these, spoken of the Plaintiffe, and to himself. Thou wert in the Goal for robbing of such a one in the high-way. It was moved in arrest of judgement, that these words are not actionable. Williams Iustice, these words are scandalous, and so cleerely actionable. Yelverton Iustice *è contra*, that they are not actionable, and to this purpose there was this case in the C. B. in an Action upon the Case for words, the words were, Thou wert arraigned for fellony, for stealing of a Horse, (and by Verdict, he was acquitted) it was there adjudged that these words were not actionable. Williams Iustice, there was this Case in this Court for Words, being, Thou wert in the Goal for stealing of a Panne, it was adjudged here in this Court, that the Action well lay, for these words, Croke Iustice agreed herein. Fenner Iustice, if one saith of another, thou art as very a Thiefe as any is in Warwick Goale, one being then there in prison, as accessory, and there are these words, not actionable, but otherwise it had been, if a Felon had been there in prison at that time, and so hath it been here ruled. Note, that in the principall Case, the Court differing in opinion, gave directions to have a search made for presidents in this Case.

## An Action upon the case for Words.

Action upon the case for words, being a beggarly Gentleman & a Bankrupt, spoke of a Grasier.

IN an Action upon the Case for words, for calling of the Plaintiffe a Beggarly Gentleman, and a Bankrupt, and said that he used the Trade of a Grasier, and hath gained his wealth, by this meanes. Ruled by the Court, that these words are scandalous, and well actionable, and this Rule was observed by the Court, that where one is called a Bankrupt, if hee were of no Trade, hee could not then be a Bankrupt, and then by consequence, such words spoken of him, or to him, are not actionable, but here in this case it is laid that he did use the Trade of buying and selling as a Grasier, and therefore the words are actionable, and the Action by the Plaintiffe well brought, and therefore by the Rule of the Court, Iudgement was given for the Plaintiffe, and Mich. 8. Jac. B. R. the like Judgement given by the Court for the like words.

Judgement given for the Plaintif.

*Cokaine* Plain. against *Goodlage* Defen. in an action of debt upon Apprentices Bond entred. Pas. 8. Jac. B. R. Rot. 204.

## *Cokaine* Plaintif, against *Goodlage* Defendant.

IN an Action of Debt upon an Obligation, upon an Apprentices Bond, the Case was this, Goodlage did binde his Sonne as an Apprentice with Cokaine, and did enter into a Bond, conditioned, that his Sonne should make and render to

Cokaine

Cokaine his Master a good and just account, *de omnibus bonis monetis & mercenariis*, without the imbezeling, or making any away, and that if he did imbezell any thing upon due proofe made of this, he would pay the same to him within three moneths after demand, upon due proof made thereof upon this Bond, the Plaintiffe brought his Action, the Defendant pleaded, that his Prentice had imbezilled nothing, and that no proof was made against him, for any thing, nor any notice to him given of this, nor any demand made. The doubt in this Case was, touching the manner of the proof, and what proof this should be. Flemming chiefe Justice, before the payment here to be made, there ought to precede an accompt, and upon this accompt, Arrerages to be found, and in this accompt the proof ought to be made, and he cannot be found to be in Arrerages, but by proof made, and where there is a certaine time limited for payment of the money after proof made, there the proof ought to precede the payment, so here in this principall Case he ought to make his proof before, and to give notice of this to the Defendant, before his Action brought, the which he ought not here to have brought before the three moneths ended, according to the condition of the Bond, and so the Action not well brought, being before his time. Williams Iustice, and the whole Court agreed in this cleerely, *& quod quærens nil capiat per Billam.*

Iudgement Quod quærens Nil capiat per Billam.

## *Baker* Plaintif against *Jacob* Defendant.

IN an Action upon the Case for a promise of forbearance, the Case was this, The Defendant in consideration that the Plaintiffe would forbear him, *pro aliquo parvo tempore, videlicet*, for some fortnight, or there abouts, he did assume and promise then to pay him, and for not performance of his promise, the Plaintiffe brought his Action, and shewes in his Declaration, that he had forborn him two years, and yet he hath not paid him, upon Non assumpsit pleaded, a Verdict was given for the Plaintiffe. It was moved for the Defendant in arrest of judgement, that the Declaration is not good, because there is no good consideration laid in the same, to maintain the Action, the consideration laid, being, that in consideration that he would forbear him, *pro parvo tempore*, this time of the forbearance being the consideration, and ground of the Action, is altogether uncertaine, and so void, and no good consideration, in consideration that he would forbear him, *pro aliquo parvo tempore*, this hath been adjudged to be no good consideration in Law for to ground an Action upon. Yelverton Iustice, the Videlicet here hath well explained the matter, *pro aliquo parvo tempore*, videlicet, or Anglicé, for some small time, that is to say, for some fortnight, if he had said, forbear a while, and names one day, this had been good, here it appears, that he had forborn him two years, *per spatium*, of two weeks, *& duorum annorum*. Flemming chiefe Iustice, forbear a little time, that is to say, a fortnight, and the plaintiffe layes the truth of his Case, that he hath forborne him this time, and more (that is to say, two years) this is sufficient, and a good consideration and certaine enough. Yelverton Iustice, if it had been in consideration, that you will forbear me a small time, and I will pay you, & the Plaintiffe shewes in his Declaration, that he had forborn him a fortnight, this had not been good clearly, because that no certaine consideration is here laid, for the incertaintie of the time of forbearance, and the same being without any words of explanation, but if it had been, as it is here with a videlicet, for such a time certaine, this had been good cleerly: another exception was taken because the Action was brought against an Executor, and it is not averred in the Declaration that he hath Assets, and therefore for this omission, the Declaration is not good, the whole Court disallowed of this exception for that, as the Court agreed, it is not requisite for the Plaintiffe to shew this in his Declaration, for that this ought not to be averred by him, and so the opinion of the whole Court cleerely was, that the Declaration was good, and the consideration well, and certainly laid, and by the rule of the Court, judgement was given for the Plaintiffe.

*An action upon the Case for a promise grounded on a consideration of forbearance, Pro aliquo parvo tempore (s)a fortnight*

*The Verdict in right hath well explained the matter and made the consideration to be certain.*

*Judgement for the Plaintiffe by the Court.*

## *Eylffe* Plaint. againſt *Chopley* Defendant.

In Treſpaſſe & ejectment Caſe of a deviſe by a Coppiholder to his two Sons.

IN an Action of Treſpaſſe and Ejectment, The Caſe was this, a Coppiholder deviſeth his Coppihold Land to I. and R. his two Sonnes, and to the Heires of their two Bodies begotten, and wills, that each of them ſhall enter at their ſeverall ages of twenty one years, and that his Executors ſhall take the profits of the Land, untill they came to their ſeverall ages of twentie one years, I. comes to his full age, enters and ſeals an Ejectment Leaſe. The queſtion was, whether the Executors ſhall hold the Land untill R. alſo comes to his full age, and what Eſtate this ſhall be in them. It was urged that they were not to enter, untill they had ſeverally attained to their ſeverall ages of 21. years. Williams Iuſtice, Firſt, this is cleerly a joint Eſtate in them, and you cannot make this to be ſeverall, for this ſhould be repugnant to the Premiſes, they have here a joynt eſtate for their Lives, and ſeverall inheritances, and it may be, the Will cannot be performed before the full age of both of them. Yelverton Iuſtice, if Lands be given unto two, provided that one of them ſhall not take any of the profits, this is a void Proviſo, and repugnant. Flemming Chief Iuſtice, Marſhall the beginning of the Will, with the latter part of it, as the deviſe to his two Sonnes, and wills, that his executors ſhall take the profits of the Land, untill they ſhall accompliſh their ſeverall ages of twenty one years, and that afterwards they ſhall have the Land joyntly, and to the Heirs of their two Bodies, this is a clear and plaine Caſe, that both of them ought to be of full age, before they ought to have the Land. Fenner Iuſtice, if a man gives Land unto one, in the beginning of his Will, and in the latter part of the ſame will, he gives the Land to another, this is a good deviſe to the laſt man. Williams Iuſtice denied this, but it ſhall be altogether void, for the uncertainty which of them was to have it. Flemming chiefe Iuſtice, you cannot here in this Caſe, by any intendment deſtroy the deviſe made to the Executors, and the Sonnes are not to have the Land to them deviſed, untill their ſeverall ages of 21. years, and this is a plaine Caſe. Williams Iuſtice, the Sonnes here by this will, have the Land in Joynture, and there is no way for to fruſtrate, and deſtroy the deviſe made to the Executors, but they by this Will, are to hold the Land untill the full age of 21. years of both the Sonnes. Yelverton Iuſtice, this Will ſhall be conſtrued *diſtributive poſito*, that one of them be two years old, and the other ten. Fenner Iuſtice, they are Joyntenant ſtill. Croke Iuſtice, they are as diſtinct perſons, when they ſhall come to their ſeverall ages, they ſhall then have this Land, and this is the true meaning of the Will. Williams Iuſtice, there is ſome repugnancie in this Will, the deviſe is to his two Sonnes, and to the Heirs of their bodies, and that his Executors ſhall take the Profits, untill they come to their ſeverall ages of 21. years, they are not to have the ſame till they come to their ſeverall ages of 21. years. Yelverton Iuſtice, if Coppihold land doth deſcend unto one, he may wel make a leaſe before admittance, and the poſſeſſion of a Termor for years, is the poſſeſſion of him in the Remainder, and he in the Remainder may make a Leaſe before his admittance, and the admittance of his Termor ſhall be good enough to this purpoſe for him in the remainder. Fenner Iuſtice agrees with him in this, and that there may be a *poſſeſſio fratris* of a Coppihold Eſtate upon a diſcent before admittance, as appears, Coke 4. pa. fo. 23. 6. in Clarke and Pennyfathers Caſe, and a Coppiholder may have an Action of Treſpaſſe, & may take the profits of the Coppihold Lands upon a diſcent to him before admittance, the Court agreed in this, and that in this principall Caſe, the two Sonnes of the Coppyholder cannot have the profits of the Lands to them deviſed, untill they do both of them come to their ages of 21. years, but the Executors are by the will to have the ſame in the mean time, to perform the Will, and ſo the opinion and Judgement of the Court was againſt the Leſſee of the firſt Sonne, coming to his full age.

Coke 4. pa. fo. 23. 6. in Clark and Penyfathers Caſe.

Iudgement by the Court againſt the Plaintiffe.

Weſtly

## *Westley* Plaintif against *Brown* Defendant.

Westly Plain against Brown & a Bayl.

IN an Action of Debt, The Case was this, A. was Bail for Brown, in Debt, at the Suit of Westley, the money not paid, A the Bail is taken in Execution for the Debt, the Principall, Brown obscures himself: upon a motion for the Bayl, by the Rule of the Court, it was ordered that the Marshalls man should take Brown the principall Debtor, (he absenting of himself in Stratford for A. the Bail, who was before taken in Execution, and the Marshalls man accordingly did take Brown the Principall, (but he said, that the Plaintiffe, some three houres before, was with Brown the principall Debtor, and did then give him notice of the Rule of the Court, and did then advise him to absent himself, and that if he would so do, the money should be then levied upon the Bail, who was taken, and in execution for the same, but yet the Marshalls man did take him, and afterwards, the Plaintiffe did write to the Marshalls man for to let the said Brown the Defendant and the principall, *ire ad Largum*, and that he would secure him, and charge the Bayl with the debt, all this was averred, and made good by Oath to the Court. Williams Justice, this execution against the Baile, when he hath taken the Defendant the principall Debter, this now is no such execution against the Bayl, as shall any wayes hurt him, but he is to be discharged, and by the whole Court cleerely, the Plaintiffe can have no remedy against the Baile, when he hath once taken the principall in execution, but the Bail ought to be discharged, and in this principall Case there appears to be a practice between the Plaintiffe and the principall Debtor, to charge the Baile with the Debt, and to free and discharge the Principall, and this upon examination appearing fully to the Court, by Oath therefore by the Rule of the Court, the Bail was discharged, and the Principall to remain in execution for satisfaction of the Debt.

Bayl discharged, where the Principal is taken in execution.

The Plain. by practice with the principall would charge the Bayl and free the Principall.

The Bayl discharged by the Court.

## *Luther* Plaintif, against *Sanders* Defendant.

*A* scire facias ad audiendum errores entred Pasch. 8. Jac. B. R. 536.

THe Case was this, In a *scire facias, ad audiendum errores*, brought by the Plaintiffe as heire, a Diminution was pleaded, and afterwards averred by way of Plea, that the Father of the partie was then in life, and living at Yorke, it was moved, that this matter was not to be pleaded after Diminution. The whole Court cleere of opinion, that this may at any time be pleaded, and that this is a good Plea, and the life may very well be averred to be in any place, where he will, and by the Rule of the Court, an indifferent County was named for the tryall of this, and in Dower, or appeal, the life of the Husband, or of the partie killed may well be averred in any place, by the opinion of the whole Court.

*A* Plea after Diminution alledged.

## *Stone* Plaintif against *Blisse* Defendant.

Debt upon an Obligation entred. Trin. 8. Jac. B. R. Rot. 1472.

IN an Action of Debt upon a Bond. The Condition was this, that if the Defendant did pay unto the Plaintiffe all such Legacies, and Gifts, the which he had given him, and when he should come to his full age, that then the Obligation should be void. In an Action of Debt brought against the Defendant upon this Bond, he pleads to the same in this manner, That he hath paid *omnia talia legata qualia ad tale tempus* generally, and without shewing in particular, and in certaine the time when, nor yet what the Legacies were, all which ought to have been shewed certainly, and therefore the plea is not good, but void for this incertainty. Williams Justice, he ought to have shewed this in certaine in his Plea, what he had paid, and also the time of payment when this was, and also the time when hee came to his full age, and this ought to have been shewed by him, specially in his Plea, according to the con-

*A* generall plea of full performance void for incertainty for not shewed what was paid nor the time when, per curiam.

dition of the Obligation, and when this was so payd by him, and this was the cleere Opinion of the whole Court.

## *Gable* Plaintif against *Mossee* Defendant.

A Writ of error to reverse a judgement in the C. B. in an action upon the Case for a promise entred Trin. 6. Jac. B R. Rot 191.

IN a Writ of Error for to reverse a Judgement given in the C. B. in an Action upon the Case for a promise, where the case was this, the Defendant there did promise to pay such a summe of money unto the Plaintiffe when he should returne from London, the Plaintiffe there did shew, that he came from London, and the money was not paid unto him, upon this the Plaintiffe there brought his Action upon the Case for breach of Promise, and upon Non Assumpsit pleaded, a Verdict was found for the Plaintiffe, and Judgement for him given, to reverse which Judgement a Writ of Error was brought. The Error assigned was, that the Declaration was not good. First, because there was no speciall request of payment laid in the Declaration as it ought to have been. Secondly, because there was no notice laid to be given to the Defendant in the Action of the Plaintiffs return from London, when the same was, that being the time of payment, which the Defendant could not know of without notice to him given of the same. Williams Iustice, in this Case notice ought to have been given by the Plaintiffe in the Action, of the time when he returned from London, for the Defendant there could not, neither ought he to take notice thereof himself without particular notice to him given of the same. Yelverton Justice, notice in this Case ought to be given of his return from London to the Defendant, who by his promise was then to pay him the money, and herein the difference will be this, when it rests upon a matter to be done between the parties themselves, there notice is to be given of this unto the partie, who is to make the payment, upon an Act to be done by the other to whom the payment is to be made, otherwise, where it is to be done by a Stranger, for there he hath assumed upon himself, to take notice, and so there at his perill, he ought so to do, and so it hath been formerly adjudged upon this difference, and so in this Case, the Act to be done before payment of the money, being to be done by the partie himself, to whom the money is by promise to be paid, he is himself to give notice of the time of the performance of this Act by him, to the partie that is to pay the money, before he is to pay the same, and there being no notice of this laid in the Declaration, as the same ought to have been, for this cause the Declaration is not good, and this is a good Error, and so consequently the Judgement for this Cause is erroneous, and to be reversed. Tota Curia cleere of opinion, that this is a good Error, for that notice ought to have been given of the time of his return from London, and this ought to have been laid in the Declaration, and so for this omission, the Declaration is not good, and the Judgement for this Cause erroneous, and for this Error the Judgement was reversed by the Rule of the whole Court.

1. Where notice is to be given

2. Where not.

Note the difference where the act is to be done by the partie to whom the payment is to be made, and where by a stranger, as to the giving of notice.

Judgement reversed per Curiam.

## *Smith* Plaintiffe against *Jones* Defendant.

An action upon the Case upon a promise.

IN an Action upon the Case for a promise, the Case was this, A man doth devise unto his Sonne seven pound, makes his will, and his Wife Executrix, and dieth, afterwards she takes another Husband. So that by this, all the goods come to the hands of the Husband, the Wife dyes, the Husband afterwards makes his promise. In consideration that he had the goods, being more, then will satisfie the Debts, and Legacies, if the Plaintiffe being the Sonne, and Legatee, would forbear to sue him, for such a time certain. In consideration of this, He did assume and promise to pay unto him the said seven pound. The Plaintiffe shewes, that accordingly he did forbear to sue him, but yet the Defendant hath

hath not paid him the ſeven pound according to his promiſe, to his dammage, &c. and for this cauſe the Action brought. The Defendant for plea ſaith, that his Wife was dead before his promiſe made to the Plaintiffe, and therefore he ought not to be bound by his promiſe made to the Plaintiffe, to pay him this ſeven pound. To this Plea, the Plaintiffe demurred in Law. Yelverton for the Plaintiffe; If a man takes to Wife an Executrix, all the Debts being paid, and he hath goods in his hands to pay Legacies, the Wife dies, whether the ſurviving Husband may be ſued for theſe goods, in the Eccleſiaſticall Court by the Legatees, for their ſeverall Legacies. It is held that they may be very well ſued there by the Legatees, and that this is a uſuall courſe. Flemming chief Juſtice denied this, for that the next of Kinne to the Wife, may have Letters of Adminiſtration granted him of theſe goods, in the hands of the Husband. This promiſe here made by the Defendant, to pay the Legacie, was made after the death of the Wife, and therefore no good promiſe, wanting a good conſideration, for if he be not chargeable with the payment of this by Law, (as he is not) he ſhall not be made lyable to pay this, by reaſon of his promiſe made to pay it, this his promiſe being void in Law. Yelverton, if the Defendant be chargeable in the Eccleſiaſticall Court for theſe goods, then he may be well ſued upon this his promiſe, but if he be not queſtionable there for them, then is his promiſe void in Law, and he not chargeable therewith. Flemming chiefe Juſtice, If the Defendant had been queſtioned for theſe goods in the Eccleſiaſticall Court, this had been a good plea there for him to have ſaid, that he would deliver the goods, to him which had the next and beſt right to have them, and this would have been a good Barre unto the Action there commenced againſt him for theſe goods. The Court cleere of opinion, that if the Defendant could not be ſued for this Legacy, the promiſe by him made to pay the ſame, is not good. Yelverton, the Husband may well be ſued for theſe goods in the Spirituall Court, and therefore his promiſe to pay this Legacy is good, and he ſhall be chargeable therewith. Flemming chiefe Iuſtice, It is true, that he may be there ſued for theſe goods, but it is as true that he hath a good anſwer to plead there in Barre, which is this, that he is ready to reſtore them unto the Adminiſtrator, and this will be a good plea, in regard, they came unto him, by his Wife. The Court were all cleere of opinion in this Caſe againſt the Plaintiffe, and therefore by the Rule of the Court, Judgement was given for the Defendant. *Quod quærens Nil capiat per billam.*

Judgment for the Defendant. Quod quærens Nil capiat per Billam.

Note, that in caſe of bayling of a Priſoner, the conſtant Rule obſervable in the Kings Bench is this, that where the return of the Sheriffe is to be at a day to come, as at *octavis Michael. proximè ſequent.* and the Priſoner is bayled (being baylable) before the day of the Return, the Bayl then to be taken ought to be in a ſumme of money, and not not to be body for body. The reaſon of this is, for that, before the return, he is not preſent in Court. But if the Priſoner be bailed after the day of the Return, and when he is preſent in Court, the Bayl is then to be *de die in diem*, and in this caſe the Bail is to be taken, body for Body, becauſe the Priſoner is Preſent in Court, and this was agreed by the Court to be the conſtant Rule, and courſe of the Court, Man. ſecundary did affirme, the conſtant Rule of the Court ſo to be.

Note the difference where the Bail is to be in a ſumme of money, and where the ſame is to be body for body.

*Lyskerrits*

## *Lyskerritts Case.*

*Lyskerrits* Case, as touching the awarding of a venire facias where the same is to be of the Town, and where of the Parish.

AS touching the awarding of a *venire facias*, the Case was this, the Major and Burgesses of Lyskerrit did claime, *prose, tenentibus, & firmariis suis* to have a Watercourse, &c. An Action upon the Case was brought, for the stopping of this Water-course, upon tryall, the *venire facias* was De Lyskerrit, Town, and not *De Parochia*. This exception was moved in Arrest of the Judgement. The Court were of opinion, that the Triall was good, and the *venire facias* well awarded. / Williams Iustice, A House was demised in Abbington, in the Burrough of Abbington, the *venire facias* was of the Burrough of Abbington, this was here adjudged to be well awarded, and was afterwards affirmed in a Writ of Error, Curia. The *venire facias* ought to be awarded, from that place which hath the best notice, and cognisance of the matter in question, and so is the Book of 10. E. 4. fo. 10. / And therefore, if there be two places, which have equall notice of the matter in question, there the *venire facias* shall be of both places, and so it was adjudged in Godferies Case this Term, in this Court, where one having a Manor in Hampshire, prescribes to have Common in Wiltshire, here in a Triall for this Common, the *venire facias* is to be awarded of both, Trin. 40. Eliz. Rot. 243.

Land demised in Abbington, in the Burrough of Abbington, the venire facias of the Burrough well awarded.

10. E. 4. fo. 10.

*Godferies* Case, Mich. 8. Jac. B. R. the Venire facias to be awarded from the place having best notice of the fact.

## A Case between *Morley* Plaintif, and *Lapham* Defendant,

*Morley* Plaintiffe against *Lapham* Defendant. Trinit. 40. Eliz. Rot. 243. B. R. are in Exchequer, The venire facias. de Maxfield wel awarded adjudged, and affirmed in a Writ of Error.

Was cited, the Case being in Debt for not performance of Covenants. The Case was this, Morley did demise to Lapham by Indenture, *omnes terras suas jacent. existen. in parochia Maxfield vocat* Hamshire Parke Habendum for one and twenty years, the Lessee Covenants, that he will not cut any Trees there growing, *super terris demissis*, above one Co de of Wood, without the assent of the Lessor. In debt for breach of Covenant, the Breach was assigned in this, that the Defendant had cut down twenty Oakes, exceeding the quantity of a Corde of Wood, upon the Triall, the *venire facias* was awarded De Mayfield, a Verdict for the Plaintiffe, this Acception moved in Arrest of Judgement, that the *venire facias* was ill awarded, the same being de Mayfield, whereas (as it was urged) the same ought to have been De parochia de Mayfield. Judgement was given for the Plaintiffe, and the same affirmed in a Writ of Error, and held by the whole Court, that the *venire facias* was well awarded. / In the Principall case was also cited a Case, wherein Bedell was Plaintif against Stanborough Defendant, Pasch. 38. Eliz. 2. Rott. 481. In an Ejectione firme, the Plaintiffe counted upon a Lease made at Denham, of a House and 40. Acres of Land, in parochia de Denham, the *venire facias* was awarded De Denham a Verdict passed for the Plaintiffe. It was moved in Arrest of Judgment, that the *venire facias* was misawarded, because it was not awarded, De parochia de Denham. Judgement was given for the Plaintiffe, and this affirmed in a Writ of Error, the misadwarding of the *venire facias*, being only assigned for Error, and Judgement affirmed by the Court, that the *venire facias* was well awarded. In the principall Case here, the *venire facias* to be well awarded, and Judgement was given for the Plaintiffe

*Bedell* Plaintiffe against *Stanborrough* Defendant, Pasch. 38. Eliz. B. R. Rott. 481. in Judgement in B. R. Venire facias De Denham & non de parochia de Denham well awarded, adjudged, and affirmed in a writ of error. Judgement for the Plaintiffe.

The

## The Bishop of *London*, and *Baldwine* Plaintifs against *Drew* Defendant.

A Writ of Errror to reverse a Judgement given in *Communi banco*, in a *Quare Impedit*, the Case was this, The Bishop of London, at Fullam, did grant the nert Avoidance to a Church of his presentation in the County of Wigorn. upon an Issue taken, *quod non concessit*, this was tried in Comitatu Wigorn. Judgement for the Plaintiffe, and a Writ of Error brought, and for Error assigned, that this was a misstrpall, against this the Book of 43. E. 3. fo. 1. was cited to prove that the tryall ought to be where the Land is, and so was it cited to be adjudged in a case between Heale, and Spratt, concerning the Church of Newton-Jefferies where the Grant was made in London, of the next avoidance of a Church in the Countie of Devon. and there in that Case it was adjudged, that the Trpall ought to be where the Land is. Fenner Justice, a grant is made here in London, of Land in Comitatu Wigorn. *Non concessit* is pleaded, and Issue taken upon this, this may be well tried in either place, either where the Grant was made, or where the Land lieth. Yelverton Iustice made some doubt whether the Tryall were good, in Worcestershire where the Church was, Williams, Fenner, & Croke, Iustices, cleerely of opinion, that this Triall in *Comitatu Wigorn.* where the Church was, was good, and the Issue well tryed, and Judgement was afterwards given accordingly for the affirmance of the former Judgement. Yelverton Iustice agreeing with the Court herein.

Entred Hill. 7 Jac B.R. Rot. 502.

Error upon a supposed misteriall.

43.E.3. fo. 1. the tryall to be where the Land is, Heal & Spratts Case and accordingly for the Church of Newton Jefferies.

Judgement affirmed per Curiam.

## *Pollard* Plaintif against *Casy* Defendant.

IN an Action of Tresspasse, for stopping of a way, upon not guilty pleaded, a Verdict was given for the Plaintiffe in arrest of Judgement, two Exceptions were taken at the Declaration, that the same was not good. The first Exception was, that the Plaintiffe claimes to have a way, from his House to a Mill, and so back again, from the Mill, to his House, and that the Plaintiffe claimes an inheritance in the House, and therefore he ought to have had an Assise of Nusans, and not an Action of Tresspasse, and for this was cited the Book of Mic. 2. H. 4. fo. 11. and of Hillar. 8. Eliz. Dyer. fo. 248. Pla. 80. The Court in this case was Cleere of opinion, that the Declaration was good, and that the Plaintiffe might have either an Action of Tresspasse, upon the Case, or an Assise of Nusans, which he pleased, and either way good. The Second Exception was this, every way ought to be, either appendant or engrosse and so to be laid, and it is not here in this Declaration alledged by the Plaintiffe, that this way was appertaining to the House. The Court were cleere of opinion, that this ought to be so expressed in the Declaration, for that the Plaintiffe here in this Action is only for to recover Dammages, and that for the tresspasse done, but in an Assise of Nusans, otherwise it is, for there the thing it selfe to be recovered. In this principall Case he ought not to alledge in his Declaration, that this way, was appendant to the House, for it is laid to be from the House unto such a place, and from the same place, back again to the House, and so the Declaration is good. And therefore the Rule of the Court was, *Quod intretur judicium pro querente.*

Tresspasse for stopping of a way.

Where tresspasse, and where an Assise of Nusans lyeth. Mich. 2. H. 4. fo. 11. Hillar. 8. Eliz. Dyer fo. 248. pla. 80.

Judgement given for the Plaintiffe.

*Pompier*

## *Pompier* Plaintif againſt *Chamberlain* Defendant.

Entred Hil. 7. Jac. B R. Rot. 197.

A Replevin the Defendant Travers Replication had for want of a Travers.

IN a Replevin, the Defendant avows the taking, and juſtifies for that the place where the taking was, was called Ree-meadow, parcell of the Mannor of Dam; being the Freehold of one Chamberlaine, and that he, as his ſervant, did take the Cattell there dammage feaſant, and ſo juſtifies his Servant unto Chamberlain, and in his right. The Plaintiffe replies, and for Plea ſaith, that long time before Chamberlaine was ſeiſed of this, that one I. S. a Stranger was ſeiſed, and ſo conveyes a Title to himſelf under him, but takes no Travers, as to the Freehold alleadged to be in Chamberlain. The Court cleer of opinion, that the Plaintiffe ought to have made anſwer to the Freehold of Chamberlain by way of Traverſe. Williams Juſtice, he ought to have ſaid, that long time before Chamberlain was ſeiſed, that I. S. was ſeiſed, and to have concluded with a Travers, *abſque hoc*, that the ſame was the Freehold of Chamberlain *tempore captionis*, and this had been good, but the Replication being without this Traverſe, is not good, and ſo Judgement was given by the Court for the Avowant, againſt the Plaintiff.

Judgement given for the avowant againſt the Plaintiffe.

## *Smith* Plaintiffe againſt *Nuſam* Defendant.

Entred Paſc. 8. Iac. B. R. Rot. 146.

En debt for Rent.

IN an Action of Debt brought for Rent, the Caſe was this, George Smith Father of the Plaintiffe, made a Leaſe for years, reſerving twentie Markes Rent at two Feaſts, ſolvendum the ſaid twentie Markes *eidem* G. S. *& hæredibus ſuiis ad terminos prædictos*, and doth not ſay, *per equales portiones*, afterwards the Father dyes, and the Plaintiffe his Heire brought his Action of Debt for the whole twentie Markes, pretending the ſame to be all paid at each Feaſt, twenty Markes, and declares that this Rent did grow due, and payable to him, *ut hæres*. To this Declaration the Defendant demurred in Law, becauſe the Action was brought by the Plaintiffe for the whole twentie Markes as due at one Feaſt, whereas but a moitie thereof was then due, and the Declaration ought to have been for no more then for a moitie of the ſaid twentie Markes. Yelverton Iuſtice *& curia*, when twentie Markes rent is reſerved to be payd at two ſeverall Feaſts in the year, the Law, by conſtruction, will make this Rent to be ſeverall, in the time of the payment thereof, as appears by the book of 13. H. 4. Br. tit. apporcionment pla. 20. where a Rent *eſt reſerva ſolvendum al feaſtis al Mich. & Paſc.* this ſhall be taken by intendement of Law, to be *æquis porcionibus*, and the Law by neceſſary conſtruction ſhall ſupply this, which was thus defective in the words of the reſervation, the Plaintiffe here intitles himſelf to this Rent as heir, but makes no Title at all to himſelfe, in his Declaration he only ſaith therein, that he is Sonne and Heire of George Smith the Leſſor his Father, but it is not alleaged in the Declaration, that this Action was brought by him, as Heir as he ought to have done, and ſo for this defect, the Declaration is vitious. Williams Iuſtice, he ought to have ſhewed in his Declaration, how he came to the Reverſion, thereby to intitle himſelfe to have an Action for this Rent. The Court was cleere of opinion that the Plaintiffe had very much failed in this his Declaration, and therefore by the Rule of the Court, Iudgement was given for the Defendant, *Quod quærens Nil capiat per Billam.*

Where the Law will ſupply words defective in a reſervation of Rent. 13. H. 4. Brooks tit. apporcionment pla. 20.

Iudgement for the Defendant Quod quærens Nil capiat per Billam.

*Hoblins*

## *Hoblins* Plaint againſt K*imble* Defendant.

Entred Paſch 3. Jac B R. Rott 517. Error to reverſe a judgement in the C.B. in an action of Detinue, becauſe the judgment was for greater dammages then the plaintif counted for.

IN a Writ of Error to reverſe a Judgement given in the Court *De Communi Banco* in an Action of Detinue there brought, in which Action, the Plaintiffe there counted to his dammage of 100. l. the Jury found the dammages to be 150. l. & ſo the Jury found more en dammages then the Plaintiffe himſelf had counted upon in his Declaration, the Plaintiffe in the Court of Common Pleas, had Judgement there given him for to recover 150. l. according as the Jury found upon this Judgement, a Writ of Error brought, and this only inſiſted upon, and aſſigned for error, that the Judgement was there given by the Court, according to the finding of the Jury, being for greater dammages then the Plaintiffe there himſelf did declare for,, and ſo for this cauſe the Judgement was erroneous, and that the Plaintiffe ought to recover no greater dammages then he himſelf declares for, though the Jury finde more, many Books were cited to this purpoſe, as 9. Eliz. Dyer 258. 20. E. 6. fo. 7. in an Action of Treſpaſſe, the Plaintiffe counts to his dammage of 10. markes, the Jury found the dammages to 10. l. the Plaintiffs prayed to have his dammages of 10. l. according as the Jury had found, there the Court made anſwer, that he ſhould have his Judgement for 10. markes according to his Count in his Declaration, for it is there ſaid, that they may abridge dammages, but not encreaſe them, and with this agrees the Book of 42. E. 3. fo. 7. where in an Action of Treſpaſſe the Plaintiffe declares *ad damnum* 40. l. and the Jury do finde the Dammages to 42. l. the Plaintiffe ſhall recover but 40. l. according to his Count, 2. H. 6. fo. 7. the Plaintiffe ſhall recover dammages according to his Count only, and not as the Jury findes, though they find greater dammages, 8. H. 6. fo. 4 & 5. to this purpoſe, 42. E. 3. fo. 7. In an Action of Treſpaſſe, the Jury found for the Plaintiffe, and dammages 42. l. the judgement of the Court was, that he ſhould have but 40. l. for that his Count was but to his dammage of 40. l. 13. H. 7. fo. 16. 17. In an Action of Treſpaſſe, the Plaintiffe counts to his dammage of 20. markes, the Jury found dammage to 22. markes. It is there held, that this is a good finding of the Jury for 20. markes only, 34. E. 3. Fitz. tit. Dammage Pla. 7. the Jury find the waſte, to the Dammage of 40. l. where the Plaintiffe, declared but to his Dammage of 10. l. the dammages here were trebled becauſe the Statute is, that in this caſe he ſhall recover treble dammages by the Statute of Glouceſter cap. 50. but in other actions, as Fitz. there obſerves, that the Plaintiffe ſhall recover no greater dammages then he counts for, although the Jury do finde greater dammages for him. 2. H. 6. fo. 7. Fitz. tit. dammage pla. 16. In an action of Treſpaſſe the Plaintiffe counts to his Dammage of 20. l. the Jury finde for him, and's dammages to 30. l. he ſhall recover dammages according to his Count, and not according to the finding of the Jury, for that the Plaintiffe himſelf, did beſt know, what he was by the treſpaſſe damnified, and the Jury may leſſen, but not enlarge, the ſame, 17. E. 2. Fitz. tit. Dammage pla. 13. In an Action of Debt upon an Obligation, the Jury findes greater dammages then the Plaintiffe counts upon, the Plaintiffe ſhall only recover the dammages as he hath counted upon, and according to this are the Books of 43. E. 3. Fitz. tit. Dammages pla 73. 44. E. 3. fo. 12. & 29. E. 3. fo. 49. Fitz. tit. Dammages pla. 133. In the principall caſe here it was held by the Court, that where the Plaintiff doth declare no certain dammage, there he ſhall recover ſuch dammages as the Jury find, but where the Plaintiffe of a certaine dammage, and the Jury do find greater dammages, there the Plaintiffe ought to have no greater dammage then according to his Court, and not as the Jury findes, they finding greater dammage then the Plaintiffe declared upon, and in this action the Plaintiffe declareing to his dammage of 100. l and the Jury finding for the Plaintiffe, and dammages 150. l. and he having his judgement for 150. l. according to the finding of the Jury, and in more then he Counted upon, and ſo for this cauſe being the only error inſiſted upon, the Court were all cleere of opinion, that the Judgement ſo given in the C. B. was erroneous, and therefore by the Rule of the Court the judgement was reverſed.

9 Eliz. Dyer pla 258 2. H. 6 fo 7.

42. E. 3. fo. 7.

2. H. 6 fo. 7. Fitz. tit. Dammage pla. 16. 8. H 6 fo 4. 5. 42. E. 3 fo. 7.

13 H 7. fo. 16 & 17.

34. E. 3 Fitz. tit. Dammage pla. 7.

2. H 6 fo. Fitz. tit. Dammage pla. 16.

17. E. 2. Fitz. tit. Dammage pla. 13.

43. E. 3. Fitz. tit. Dammage pla. 73. 44. E. 3 fo. 4. 12. 29. E. 3 fo. 49. Fit. tit. dammage pla. 133.

Judgement reverſed per Cur

## *Mills* Plaintif ——

Mills Plaintiffe —— In error, first, to reverse a judgement in the C. B.

IN an Action of Trespasse against three Defendants, the first pleads generally *Non culpam*, to the whole: the second pleads, as to part, *Non culpam*, and the third, as to another part pleads *Non culpam*. Issues joyned against them all at the tryall, the Jury found the first Defendant guilty of the whole, and the other Defendants guilty of the severall parcells, and did asse entire dammages for the Plaintiffe, and Judgement given for the Plaintiffe accordingly in the C. B, and a writ of Error brought to reverse the Judgement, and this only assigned for Error, *quia Iuratores se malè gesserunt, in veredicto dando Curiæ*, this is a cleere error, and for this Error, Judgement was reversed *per Curiam*, and a new tryall to be had.

Iudgement reversed per Curiam.

## *Brocke* Plaintif, against *Beare* Defendant.

Brock plaintiffe against Beare defendant. Hil. 7. Ja. B. R. Rot. 711.

IN an Action of Trespasse upon not guilty pleaded, the Jury found a speciall Verdict, and upon the speciall Verdict, the case was this, A Coppiholder of Inheritance, did surrender this, to the use of one for life, and afterwards to the use of another, and his heires. The Tenant for life of the Coppihold, doth build a Mansion house, and dies, after his death, the Coppihold Tenant of inheritance, pretending that foure Acres of Land, of Freehold, were not Laid to this House, (according to the Statute of 31. Eliz. cap. 7. made against Cottages erected) pulls this house down. The Jury finds, that by the Custome, no Coppihold Tenant of Inheritance, may pull down any dwelling houses, but if he do, the same shall be a forfeiture, and that this pulling down of the house was contrary to the Custome. Brocke the Plaintiffe being the Lord of the Mannor, and pretending this to be a forfeiture, brings his Action against the Defendant the Copppiholder, alledging, that the Defendant *prostravit, & voluntariè diruit—messuagium prædictum.* The Court cleere of opinion, that the Coppiholder could not pull down this House, his colour for so doing, being only, because that four Acres of Freehold Land were not laid to the same. The Custome found to be, that the Lord in such a Case, may well enter for a forfeiture *& tenentem expellere*, the Defendant here, because he had the Fee, and Inheritance, as a Customary Tenant, pretended that he might well pull down the House. Fenner Iustice, if a Tenant builds a house, and this is not covered, he may well pull this down again, for that before the covering of it, it is not a house, but when the House is covered, he cannot then pull it down, but it shall be waste: the Jury have found this pulling down of the House, to be a forfeiture, by the custome, the usage, and custome makes a Coppyhold. Yelverton Iustice, the place where this house was built, was ancient Coppihold Land, if Lessee for life builds a house upon his Land, and afterwards pulls it down again, this is waste, and this is a forfeiture in the principall Case. Williams Iustice, Lessee for life is, with a condition, that he shall not do waste, he builds a house, and pulls the same down again, this is done but of late time, and therefore he cannot enter for this condition, yet this pulling down is waste, and he shall be punished for his waste. Fenner Iustice al contrary in this, for he may well enter for his condition. Williams Iustice cleerely, he cannot enter, for this condition, for that this condition, is annexed unto the Land, and not unto the house, which was built, but of late time, and since the condition, but whether this pulling down of the house by the Coppyholder of inheritance, be a forfeiture of his Coppihold estate, this is somewhat doubtfull, in regard that this house was so built, and erected but of late time. Fenner, & Yelverton Iustices cleere of opinion, that this pulling down of the house is a forfeiture, for that the place where the house was built, was ancient Coppyhold land. Fenner Iustice, Lessee for Life is, upon condition that he shall do no waste, the Lessee commits waste, the Lessor enters for the the condition broken, he shall not have an Action of Waste, for Waste done before his Entrie. Afterwards Termin. Hillar. 8. Iac. B. R. This Case was moved again, and John Moore argued for Brocke the Plaintif.

Stat. 31. Eliz cap. 7. made against Cottages.

Termin. Hill. 8. Jac. B. R.

Two

Two matters arise upon this speciall Verdict. First, Whether a Coppiholder, may by law justifie this erection of a Cottage, and Secondly, if he shall be dispensed with-all for this, by Statute Law, whether then by the common Law, this pulling down shall be a forfeiture, if not, then whether it shall be a forfeiture, by the Custome, as the same is found by the Jury. First, it is to be examined here, what Estate a Coppyholder, or a Customary Tenant hath, he hath only a bare estate, as a Tenant at will, and this is not to be denyed, a Tenant at will, ought not to deale, or meddle with the Land, he is not bound to doe, and perfoyme such things upon the Land, as Tenant for years is to do, and this appears by Littleton, that he shall not be punished in waste, for permissive waste, 8. E. 4. fo. 6. & 7. & per the common Law, Tenant at will cannot cut down any under-wood, and voluntary waste by him shall be a forfeiture, and so if he alien, or make a Feoffement, or a Lease for years, as appears in Murrell and Smiths case, Coke 4. pa. fo. 24. & Taverner, & Cromwels case, Coke 4. pa. 27. if a Coppyholder cut down Trees, this shall be a forfeiture, and by 9. H. 4. Fitz. tit. Waste pla. 59. that a Tenant by Copy of Court Roll ought not to do waste, nor to cut Trees to sell, but only for to repair his House, he hath here an inheritance by the Custome, but when hee doth that which is Contrary to the Custome, hee shall then be in no better a condition, then a bare Tenant at will, if Lessee for years build a House, and afterwards pulls it down again, this will be waste, so here in this case, the pulling down of the house by Beare the Coppiholder, is a forfeiture by the Statute of 31. Eliz. cap. 7. no Cottage erected is to be suffered, unlesse that foure Acres of Freehold Land be Laid unto it, this Statute was made to restrain Lords of great Wastes, from building of Cottages, without laying of four Acres of Freehold Land to the same, this Statute to be extended to none, but to those which have a Freehold of inheritance, and not to be extended unto such a Coppiholder, but admitting this to be within the Statute, hath the Coppyholder then power and Authoritie by this Statute (as this case is) to pull the house down againe, he hath not. Yelverton Iustice, this Case needs no help of any custome, for by the Common Law, this is a cleer forfeiture. If the custome be, that a Coppyholder may pull down Houses, such a custome is not good, if the custome be, for a Coppiholder to cut down Trees, in this, for the warranting of such a Custome, the difference will be this, if he be a Coppiholder of inheritance, then such a Custome for to cut down Trees, by such a Coppiholder, will be a good custome, but otherwise it is, if he be but a Coppiholder for life, there such a custome to cut down Trees, is not good. As to the Statute of 31. Eliz. cap. 7. against the erecting of Cottages, this Statute extends to every Freeholder, to any one which builds a new house, or converts old houses unto Cottages, this Statute meant to meet with them all, and such a Coppiholder, as in this Principall Case, is within the danger of this Statute. Croke Justice agrees in this, and that a Coppiholder cannot prescribe to do any thing, that may any wayes trench to the disinheritance of the Lord, a Coppiholder of inheritance, by custome, may cut down Trees, but not another Coppiholder. Fenner Justice, a Coppiholder is not within the Statute of 31. Eliz. cap. 7. and if the Lord layes Freehold Land to this messuage, this is no parcell of it, and so not within the Statute, and there is no such power in a Coppyholder to do as the Statute doth require to be done, I was present with the Lord Popham, when at an assises he did adjudge according to this upon an evidence before him, that a Coppyholder was not within the Statute of 31. Eliz. cap. 7. for erecting of Cottages, and this I conceive to be very cleere, that a Coppiholder is not within that Statute. But as to the other point, I hold it, in some cleerenesse, also that when the Coppiholder, in this principall case, had erected such a house or Cottage, he cannot pull the same down again, but it will be a forfeiture. Flemm. chiefe Justice, the matter here was, that the woman who did erect this house, or Cottage, was a Coppihold tenant for life, and did not lay 4. Acres of freehold land to it. As to the chief point in question, being, whether a Coppiholder may pull down houses edified, & erected for habitation, it is found by the special verdict, that by the custom of the Mannor, a Coppiholder shall not do any waste, & it is very cleer, that if a Coppi. do pull down houses

8 E. 4. fo. 6. & 7.

Murrell & Smiths case Coke 4. pla. fo. 24.

Taverners & Cromwell case Coke 4. pa. fo. 27. a.

9 H. 4 Fitz. tit. waste pla. 59.

31. El. 2. cap. 7.

31. El. 2. ca. 7.

31. El. 2. ca. 7.

when they are built, this shall be adjudged to be Waste, and it is as cleere, that this shall not be ayded, by alledging that the same was newly built, for this is not matteriall, for when the House is once builded, the same is then annexed unto the Freehold, the second matter here considerable is, touching the Statute of 31. Eliz. cap. 7. whether a Coppyholder be within this Statute or not, if a Coppyholder of 20. Acres of Land, to him and his Heires by the custome of the Mannor, erects a House, or if a Coppyholder be, who hath but three Acres of Land of inheritance, by the custome, and having no House, erects a House. I think (and that in some cleernesse) that a Coppiholder is not, nor yet ever was taken to be within the meaning and intention of the same Statute is generall, That no persons shall erect——and unlesse he lay four Acres of his Freehold Land to it, this is to be understood (if he be a Freholder) and doth erect a House, and not lay 4. Acres of Freehold Land to it, he shall then be in danger of that Law. But a Coppyholder is is not within that Law, if he build a House for the Habitation of others, the Statute restraines none, which do build a House for their own dwelling, but for to prevent, and to meet with, the great greedinesse of Landlords, was this Statute made, the which Statute intends such a one, who hath good power to build, and also to pull down, as he pleaseth, and when he pleaseth, which a Coppyholder hath not, nor yet a Termor for years, & therefore they are not within the same Statute, if the Custome of a Coppyhold mannor be, that if a Coppyholder do commit Waste, that this shall be a forfeiture, this Custome shall be taken strict, and shall not be extended to permissive waste. In this principall Case, the pulling down of this House by the Coppyholder, is a cleere forfeiture of his Coppihold estate. Yelverton Justice, the Statute is generall, No persons shall erect—but yet there is no question, if a man do erect a House for his own habitation, this he may very well do, and this is out of the Statute, for the Statute is this, that he shall not build a House for the habitation of another, without laying of foure Acres of Freehold Land to it, otherwise he shall be in danger of the Law. But if a Coppiholder erects divers Cottages upon the Land, within the Mannor, or if a Freeholder erects a Cottage, and dwells in the same himselfe, this is not within the danger of the Statute. Flemming chiefe Justice, If a Coppiholder having twelve Acres of Land, erects a house, and allots to it, two Acres, this is not within the Statute. A Coppiholder erects a Cottage, and layes Freehold Land, part of his own Freehold Land to it, yet this is not within the Statute, notwithstanding, that it is not Coppyhold Land, but Freehold Land, that is laid to it. This matter was afterwards moved again, & *Curia* unement accord, that this Statute intends Cottages erected for the habitation of others, that is to say, for Strangers, and so by this meanes to draw many together, for the prevention of which mischiefe, that might thereby ensue, was this Statute made. Williams Justice & Curia accord. in this, that a Coppyholder, is not within this Statute of 31. Eliz. cap. 7. for erecting of Cottages, and the Court also agreed in this, that the pulling down of this House, (to erected by the Coppiholder) by him is a Cleere forfeiture of his Coppihold estate, and so *per curiam*, Judgement was given for the Plaintiffe, and the Rule of Court entred accordingly, *quod intretur judicium pro querente.*

31. Eliz. cap. 7.

Stat. 31. Eliz. cap. 7.

Iudgement per Curiam pro Querente.

## *Hewet* Plaintif against *Norberow* Defendant.

A Trespasse for the taking of a Cow, the Defendant doth justifie as Bayliffe of the Court Baron.

In an Action of Trespasse, for taking of a Cow, the Defendant justifies, as Bayliffe of the Kings Mannor of Dunstable, and upon the justification, the case appeared to be this, That at the Court Baron, there held, the Plaintiffe being a Suter, was attached to came to the Court, but came not, afterwards he was distrained, *per bona, & catalla*, and yet came not, whereupon the Defendant as Bailiffe of the Mannor, caused the distresse to be praised and sold. The question was, whether by this his non-appearance after that he was distrained *per bona, & Catalla,*

*catalla*, the distresse so taken be forfeited, or not, and whether this distresse so taken for the Cause, so as aforesaid, may by the Bayliffe be sold, or not, for the sale of the distresse, the Book of 18. E. 4. fo. 21. was cited, where the Sheriffe returns that he had distrained the partie by certaine Chattels *ad valenciam* xx. d. the which were forfeited. Williams Iustice, the Bayliffe may sell the distresse taken, if he come not in at the time appointed, the distresse by which he was attached, shall be forfeited, and may be sold. Fenner, & Yelverton Justices al contrary, the Distresse is not forfeited, nor can be sold by the Bayliffe, but upon this his not appearing, there shall issue forth against a him, a distresse infinite. First, an Attachment to be, and if he appears not upon this, then a *Distringas, per bona & catalla*, to issue out. Williams Iustice, by his not appearing, the distresse taken is forfeited. Fenner, Yelverton Iustices clearely, the distresse by this is not forfeited, but a distresse infinite shall be awarded, but no Cattell shall be attached, but only such, in the which the partie attached hath a propertie, but in case of another distress, otherwise it is not, being there materiall whether he hath any propertie, or not, in the Cattell distrained, and the reason of the difference is this, for that when goods are attached, for the not appearing of the partie, the goods are to be forfeited, and this is the reason for that, one by his not appearing, shall not forfeit the goods of another man, but otherwise it is in case of another distresse taken, for there the distresse so taken, shall be only in *Custodia Legis*, untill satisfaction be made to the partie which hath distrained the same. This Case was afterwards moved again, and the only question insisted upon was, whether the Bayliffe may sell a distresse by him taken, for a default, in not appearing at a Court Baron, or not, the Bayliffe here in this case kept the distresse so by him taken twentie dayes, and afterwards sold the same, and so justifies the taking, and sale thereof, where a distresse shall be sold, and where not, these Books were cited, as 3. H. 7. fo. 4. 6. It was there moved, that if the Lord of a Mannor having a Leete, and a distresse be there taken, for the Lord whether it may be sold, or not, there by Fairefax hee may well sell the distresse, for that this is the Court of the King, notwithstanding it was in the hands of a common person, and so is 11. H. 7. fo. 14. a & 21. H. 7. fo. 40. 6. whether in this principall Case, the Bayliffe may sell the distresse, being taken in the Court Baron of the King. It was urged, that this was not meerly a Court Baron, but a Court of Records, and it was *Curia domini regis manerii sui de Dunstable*, by the Book of 9. E. 4. 2. if Cattell are distrainees, they are to be put in a common pound, that so the owner may come to give them meat, and if they there dye, this shall be at the losse and perill of the owner, but if they be *bona peritura* which are taken by way of distresse, if they come to perish, and to be good for nothing, this shall be at the perill of him that distrained them at his losse, and therefore for this cause, in such a Case, such a distresse may well be sold, rather then to be suffered to perish. See the Statute of Magna Charta cap. 8. Rastall Debt to the King fo. 101. and the Statute of Marlebridge cap. 10. Rastall tit. Distresses fo. 107. pla. 1. Curia, but there is no Statute made as touching Distresses to be taken in a Court Baron. Williams Justice, he was here distrained, *per bona, & Catalla*, and this is to be intended, that he had one day given him for to appear, and for his not appearing, being distrained, the distresse is forfeited, as in an Attachment, where attached, by his Lands and Tenements, *per omnes terras, & tenementa*, the distresse was first, he was also distrained, and did not appear at the day, and therefore pleaded, that the distresse was taken, & *legitimo modo appreciare fecit & adtunc, & ibidem vendidit*, the goods were well taken, for his not appearing, the distresse forfeited, and the sale of the distresse good, and the Defendant may very well justifie the sale. All the other Judges clearely against him in this, that the distresse was not forfeited, and the sale made by the Bailiffe not good, but he ought safely to have kept the distresse, and not to have sold the same, and so *per Curiam* the justification of the Defendant (as Bayliffe of the Court) to sell the Distresse is not good, and so by the Rule of the Court, Judgement was entred for the Plaintiffe.

18 E. 4 fo. 21.

Note the difference.

3. H. 7. fo. 4. 6.

11. H. 7. fo. 14. a. 21. H. 7. fo. 40. 6.

9. E. 4. fo. 26.

Statutes, Magna Charta cap. 8. Rastall Debt to the King. fo. 101. pla. 1. & Marlebridge cap. 80. Rastall tit. Distresses fo. 107. pla. 10.

Judgement pro Querente that the justification to sell the distresse was not good

*Dominus*

## *Dominus Rex* Plaintif against *Stafferton*, and *Brown* Defendants.

An Information upon a Quo warranto for claiming liberties.

AN Information upon a *Quo warranto* by what Warrant they claimed to have certaine Liberties. Brown, one of the Defendants disclaimes in all the Liberties, and so a Judgement entred against him for the King upon his disclaimer, the Defendant Stafferton disclaimes likewise in all, but only, in one, and that was, to have, and hold a Court Baron, and for maintenance of this, by his plea he shewes, that Sir Henry Nevill was seised of an Ancient Mannor, of which Mannor, the Mannor of Newnam and others are parcell, and conveyes to himself, from Sir Henry Nevill an admittance to the Manner of Newnam in 4. Eliz. and so likewise of two others (s) of Lakes, and Ayleworth, these by the name of so many Acres, and shewes that a Messuage, and seven Acres of Customary Land, used to be Demised, were to him conveyed by Sir Henry Nevill *Tenendum secundum consuetudinem manerii.* The sole and only question in this Case, upon this *Quo Warranto* was, whether Stafferton, by his Plea hath so well intitled himself to the Mannor of Newnam, as that he may justifie the keeping of a Court Baron. Against this *Quo Warranto*, as was argued, that where there is a Mannor, there of Common right, as incident thereunto is a Court Baron, and this appears to be so by the Book of 13. E. 4. fo. 18. Even as a Court of Pypowders is incident to a fayre, and with this agrees the Book of 19. H. 8. Br. cases fo. 2. pla. 7. B. tit. Incidents. Pla. 34. here in this Principall Case, the *Quo warranto* is *Quare clamat tenere Curiam Baronam*, In Tr. 17. E. 2. Brit. tit. Quo warranto Pla. 4. Quo warranto, he claimes to hold a Court of his Tenants, within his Mannor. It is there held, that it is sufficient for him, to shew that he there hath a Mannor, without saying any more, and there it is said, that he need not to make any further or other answer thereunto, so he might well have pleaded here, that he had a Mannor without saying any more Kellaway fo. 138. In Itinere en temps roy. E. 3. pla. 3. en Gernesey, un Quo warranto issuists, pur, &c. he claimes to have a Court of his Tenants, it is here said, that the Common Law, gives him a Court of his Tenants, and therefore he ought not to make any claime to it, for that this lyeth not in point of Franches, so here in this principall Case, the Court Baron, lyeth not in point of Franches, but admitting that he ought to make a title unto this Mannor, he hath here made a good, and a sufficient Title, one Mannor may well be parcell of another, and one Mannor may be held of another, as appeareth by the Book of 32. H. 6. fo. 9. All that is here desired, is but to hold a Court Baron: as to the manner of his Title here made, he intitles himself to this Mannor of Newnam, by this manner of conveyance by the name of a Messuage, and of seven Acres of Land Customary, used to be demised, *tenendum secundum consuetudinem manerii.* In Hill. 4. E. 3. fo. 124. pla. 25. where the conveyance to a Mannor is pleaded to be by the name of two Messuages, and of two Carewes of Land, and by 6. E. 3. fo. 243. & 9. E. 3. Assigne pleaded of a Mannor, by the name of 8. l. land, & therefore it also appeareth, that a Mannor may well pass, by the name of 8. l. land, or of a messuage. Also a Manor may be known by the name of Priory, or Chauntery, and by the same name it may passe, as appeareth by the Book of 17. E. 3. fo. 8. where a Feoffement made of a Mannor, by the name of Knights fee, and this is there held to be good, this having usually carried the name of Knights fee, and the same may well passe by this name, either by fine, or by feoffement, here in this principall case, the manner was *cognitum, & vocatum*, by the name of 7. yard Land, as well, as by the name of Mannor, and so in this manner, the same passed, and so here is a good interest set forth by the Defendant, that this was time out of mind demised by Copie, and this is sufficient for him to keep a Court Baron as incident thereunto. Yelverton al contrary, and prayed that

13. E. 4. fo. 18. 6.

19. H. 8 Br. Cases fo. 2. pla. 7. Br. tit. Incidents pla. 34.

Trin. 17 E. 2. Br. tit. Quo warranto. pla. 4.

Kellaway fo. 138. in Itinere E. 3. pla. 3. in a Quo warranto, he claimes a Court of his Tenants.

32. H. 6. fo. 9.

Hill. 4. E. 3. fo. 124. pla. 25.

6. E. 3. fo 243. 9. E. 3.

Mannor by the name of 8. l. Land.

17. E. 3. fo. 8. a Mannor by the name of Knights fee.

that the Defendant may be ousted from keeping of this Court Baron. It is here said in this principall case, that Sir Henry Nevill was seised of the Mannor of, &c. of which the Mannor of, &c. Newnam and others are parcell, and that in 40 Eliz. he was admitted unto this, and so unto the two others, by the name of so many Acres, but as to the Mannor of Newnam, there is no plea at all made by him, as to the case cited in 17. E. 2. Br. tit. *Quo warranto* Pla. 4. *Quo warranto* he held a Court of his Tenants in his Mannor, there he pleaded that he had a Mannor, and this was sufficient, here he intitles himself unto seven yard land, and 20 rent, *& eo Warranto* claimes to hold a Court Baron, this is no good plea, for it is unpossible for a Coppihold Mannor to be a Mannor, for that he came to have any freeholder, and one cannot have a Mannor, if he be not capable to have an Escheat, and therefore a Coppihold Mannor cannot be a Mannor, also it is here alledged, that this is only a Mannor in reputation, and that this may passe in this manner, by a conveyance, and that one Mannor may may be parcell of another, and one Mannor may be held of another, this Principall case here is out of the Reason given in Kellaway, before cited, the King is the Originall of all Franchises, and a *Quo warranto* is the Kings Writ, a Tenant at will, hath no Title to keep such a Court, being but a Customary Tenant himself, of a Mannor, the King here ought to be answered in chiefe, and it is to be observed for a Rule, that none can plead a chiefe, with the King, but he which hath a freehold, and here the Defendant which hath only an estate at will, and so cannot hold a Court Baron, because he is not capable of an Escheat. Croke Iustice, the plea here of the Defendant is not good, the same being in it selfe repugnant, for that it is impossible for one Mannor to have two Court Barons, they are two Mannors here, but that is so, *diversis respectibus, non simpliciter, & absolute*, this here is a great usurpation, upon the Prerogative of the King, for one to use a Mannor, and keep a Court Baron, and that without having of any good title, Tenant at will of a Mannor, may grant a Coppihold Estate, but not keep a Court Baron, he hath made no good title here, and so he ought to be debarred from holding of a Court Baron. William Iustice, it is to be considered, whether a *quo warranto* lyeth, against one, to shew, by what title he keepeth a Court Baron, or not, as to this. In the beginning, all these liberties were in the Crown, and as it is said in Kellaway fo. 138. the King is the Originall of all franchises, and the *Quo warranto* is called the Kings Writ, and that a *Quo warranto* lyeth of a Court Baron, this appears by old *Natura brevium* fo. 160. the sole and only Authoritie, for this, where it is said that this Writ of *Quo warranto* lyes for the King, in case where a man usurpes certain Franchises, upon the King, as for to have Waife, or Stray, Warch, or Ferrie, or a Court Baron, or any such like, without any good title, and against the will of the King, if he hath good title, to hold this, he must make this to appear, this Court Baron is incident to every Mannor, but as to this, it is to be understood to be of a Mannor, in *Facto*, and in truth, but not to be, as in this principall case, a Mannor only in intendment, and a nominall Mannor. A Man cannot have a Court Baron without a Mannor, for that this Court is incident to a Mannor, and cannot be severed from it, as appeareth by the Book of 19. 8. Br. Cases, fo. 2. Pla. 7. Br. tit. Incidents Pla. 34. a Court Baron is incident to a mannor, and a Court of Pypowders to a Faire, and the Lord of the Mannor cannot grant away his Courts to another, and if he grant away the Mannor, or Faire, he cannot reserve such Courts unto himselfe, for that they are incident to the Mannor, 8. H. 7. fo. 4. Br. tit. Incidents pla. 16. there by Bryan to every Mannor there is incident a Court Baron, and by Vavisor, there are certaine things that are incident to the principall, as Fealtie to Homage, Homage to Escuage, a Court of Pypowders to a Faire, and a Court Baron to a Mannor, and by the Grant of the principall, these things do passe without being named, 12. Eliz. Dyer pla. 288. The King by his Letters Patents doth lease the Mannor of Rocke unto Orme for years, except all the Courts, and Perquisites, afterwards the King grants the reversion to a Stranger, with the Perquisites, and Courts, the Grantee makes another Lease to begin

10. H. 8. Brit. Cases fo. 2. pla. 7. Br. tit. Incidents pla. 34.

8. H. 7. 4. Br. tit. Incidents pla. 16.

12. Elyz Dyer fo. 288. pla. 54.

begin after the first Lease ended, except Courts et perquisites, it is there held, that this exception is good, in a lease of the King, contrary in the Leale of the grantee, the same being repugnant to the Lease of the Mannor. 34. *H.* 6. *fol.* 49. every Mannor hath a Court Baron as incident to the same of common right. Fitz. tit. Court. pla. 1. Also to a Mannor there is requisite to be Demesnes, and services, here in this case he ought to make a good title to the Mannor. Otherwise he cannot justifie the keeping of a Court Baron. If a man have 100. Acres of Land, and these passed unto him, by the name of a Manor, this is good, but yet this shall not be in him as a Mannor. A Coppyholder, cannot grant a Coppyhold, this is impossible, here in this case in question, he hath only the name of a Mannor, but not the effect of it. In a *Quo warranto*, a Customary Court, is not in question, but at the common Law, one Mannor may be held of another, this is clear, and when the same escheates, the other is extinguished, and the new remains, and this appears by Sr. Henry Nevils case. Cooke 11. pag. fol. 17. Where it is Resolved that there may be such a customary Mannor, held by Copie, and that such a customary Lord, may keep Courts and grant Copies. And that such a customary Mannor may passe by surrender, and admittance. But in this principal case, there is no book, nor any authority in the Law, to warrant the Defendor, to keep a Court by reason of this Coppyhold Mannor, which he hath, he having made no title unto himselfe, unto the mannor, and so he is not any wayes enabled to hold, and keep a Court baron, and so his plea to this *Quo warranto* by way of Justification, is not good, nor to be allowed of as sufficient. Yelverton Justice. Usurpation el Lete, et court baron in this *Quo warranto* is examinable. It is to be considered, whether here be any good barr and title made against the King in this *Quo warranto*. It is very clear, that neither the barr, nor title here made is good, but that by the Judgment upon this *Quo warranto*, he ought to be ousted of this Court Baron, a man cannot make a Mannor at this day, as appears by 5. H. 7. fol. 38. Br. tit. Compriſe pla 34. That a Mannor cannot be, but by antient continuance, for a Mnnor cannot be made at this day. A man which hath not a Court, cannot enable another to keep a Court, and there cannot be a Mannor without a Court. Perkins chap. Reservations ol. 127. pla. 670. as touching the commencement of a Manor, a Court Baron is incident to a Mannor, & is not to be severed from it unless it be in the case of the King, but not by a common person this is not possible to be done; by the same name as land comes, by the same name the land may well pass again, but this cannot make this to be a mannor, one Mannor may be parcel of another for a time, but not perpetually, one may be Lord of another, and there is no question to be made, but this which escheats, doth continue to be a Mannor still, the quantity of land by which the same is passed, is not material. That a *Quo warranto* well lieth in this case, to know why he keeps a Court baron, without any title made to enable him so to doe, and this is very clear, and not to be questioned, the reason of this is, for that this is a jurisdiction, the which he cannot have nor maintain, without a Mannor, the question here is, whether he may Maintain, and justifie his keeping of a Court baron, by his having of this Coppyhold mannor held of another Mannor, and clearly he cannot: and as touching his title here made, it is very clear, that here he hath made no good title to justifie his keeping of this Court baron against the King, and therefore by the judgment of the Court upon this *Quo warranto*, he ought to be ousted from keeping of this Court baron——— Flemming chief Justice. The first point here considerable is, whether a *Quo warranto* lieth for the keeping of a Court baron in a Mannor, or not. A Court baron is incident inseparable to a Mannor, without any grant to him made by the King, to keep the same, and this is not claimed out of the Crown, but is to be used and held of necessity, *de necessitate*, and no Jurisdiction by this drawn, or derived out of the Crown by this, these Courts are to be held to avoid inconvenency, and this is to be so, without any special grant of the king. Mannors cannot be at this day created, unless it be by way of derivation, as being derived out of the ancient Mannor, which descends unto Coparceners, in this case upon partition had

34. H. 6. fo. 49. Fitz. tit. Court pla. 10.

Coke 11. pa. fo. 17. 18. 5. Henry Nevils case.

. H. 7. fo. 38, Br. tit. compriſe pla. 34.

Perkins chap. observations fo. 127, pla. 670.

had of such a Mannor between them, the same shall now be in them as severall Mannors, as appears in 26. H. 8. fo. 4. where it is agreed in the end of the Case of Common, that if a Mannor descend, to two or more Coparceners, and they make partition, so that every one of them hath part of the Demean, and part of the Services, and so each of them hath a Mannor, and Br. tit. Mannor pla. 1. in abridging of that Case, concludes—*& ideo videtur*, that each of them may keep a Court, so that here, necessitie, and inconvenience causeth them to have severall Courts, but Br. makes this a quere, whether they shall hold severall Courts, in as much as it was agreed for Law in the Star-chamber, that it is not a Mannor, unlesse there be two Freeholders at the least, and in Br. tit. Cause pla. 35. it appears that in the Register fo. 11. the Paroll was removed out of the Court Baron, for that there were there but four Sutors, and therefore it is there said, quære, what number is sufficient, when there are no more. If the creation of the Mannor did not come from the King, the Court Baron is incident unto it, the Court of Pypowders, and Faires do come, and are derived originally out of the Crown. A Mannor may be, and not derived out of the Crown, and therefore *ex consequente*, neither the Court Baron which is incident to such a Mannor, but a Court Leete is not incident to a Mannor, but he which hath a Mannor, may also have a Court Leete to be by him held within his Mannor, but this ought for to be by a speciall grant from the King, and not otherwise, and then he may punish Offenders, the which he cannot do in his Court Baron, he cannot be ousted of his Court Baron, unlesse he be ousted of his Mannor, for if he have a mannor, he ought to have such a Court Baron, for this is as an incident, and follows the Mannor, as a necessary subsequent, and adjunct unto the Mannor, and therefore if he have the one (s.) the Mannor, he shall also have the other (s.) the Court Baron, there is no doubt to be made, but that a *Quo warranto* well lyeth, for one to shew, how, and by what Right and Title, he keeps a Court Baron, but it is to be well considered of, to whom the Writ of Right of the King shall be directed, being *quod dominus remitti debet, curiam suam Baronam*, his Plea here is, that three other Mannors are within the great Mannor of, &c. and usually demised by Copy of Court roll, a Mannor before the Statute may be very well derived out of another Mannor, but he ought to have said here, that such a Mannor hath been used, time out of mind, to be granted by Copie, and also, that time out of minde, such Grantees, or Donees, had used also to hold such Court Barons, and also to grant Copies of Court Rolls to others, and so he ought for to have prescribed in all this, time out of mind, and then this would have been good, and much better, then here it is, the Plea being here too short, the other way had been a sure way, and that without all question, but as the Plea here is, the same is too short, and doubtfull, there may bee a Coppyholder of a Mannor whether a Grant by Copie, made by such a Coppyholder, be good or not. Williams Iustice, cleerement, such a grant is not good. Flemming chief Iustice, such a grant is cleerely good, if he prescribes in this, that so it hath been used time out of minde, but not otherwise, and this appears Coke 11. pa. fo. 17. & 18. on Sir Henry Nevils Case, where it is cleerely resolved by the whole Court, that ther may be a customary Mannor, & held by copie, & that such a customary Lord may hold Courts, & grant Copies, and that such a customary Mannor, may passe by surrender and admittance, and that fines shall be paid upon admittance, as well upon alienation, as upon discent, and there may be also a customary Lord, Meine, and a customary Tenant, as well in case, where the mesnaltie is a Tenancy at will, according to the Custome of the Mannor, as there is a Tenancy at will, at the Common Law of a Mannor, and also if such a customary Manno be forfeited, the Lord shall have the Customes and Services as appertaining unto the same, and it is there said that the Mannor of Aylesham, in the County of Norfolke is held by copie. Hubberd Le Attorney le Roy, the question is not here, whether he may derive this from the King, but whether he may give this

26 H 8. fo 4. Br. tit Mannor pla. 1.

Br. tit cause pla. 35. & Register fo. 11.

Coke 11. pa. fo. 17. 18. Sir Henry Nevils case.

to himſelf, or not. Williams Iuſtice, the Sutors are the Judges in a Court Baron. Flemming chiefe Iuſtice, he may have here Sutors (s) thoſe which pay their Rents unto him. Williams Iuſtice, it is here conſiderable, whether he may draw the Kings Subjects to a Court, conveyed to him here, and by himſelf, the Writ of Right in a Court Baron, ſhall goe, and be directed unto the Lord Paramount. Flemming chiefe Juſtice agreed in this. Fenner Juſtice, you have no Mannor here, and therefore you cannot have ſuch a Court Baron, as is only incident unto a Mannor: you cannot here hold Plea in a Writ of Right, nor do Juſtice: Curia all accorded in this cleerely, againſt this Court Baron, and his keeping of it, having made to himſelf no good Title thereunto by his pleading, and that therefore he ought by the judgement of the Court, upon this *Quo warranto* brought againſt him to be ouſted, of the Court Baron by him kept (but of nothing elſe, that was paſſed unto him afterwards by the Rule of the Court. In Iudgement was given for the King in this *Quo warranto*, that the ſame lyeth well againſt the Defendant Stafferton, for claiming to hold a Court Baron, and that he hath made no good Title to himſelf, by his pleading to this *Quo warranto* to enable him to hold this Court Baron, and therefore Judgement was given againſt him for the King, to ouſte him, for keeping of this his Court Baron, which Judgement was entred accordingly.

Judgement given for the King in the Quo warranto againſt Stafferton, for keeping of a Court Baron.

## Error upon removing of a Record.

THis queſtion was moved, upon the removing of a Record by the Biſhop of Durham, upon a Writ of Error to certifie the ſame, whether the Record, as certified, was well removed, or not, the ſame was certified to be taken before eight, and being removed, it appeared to be taken before nine: the Principall Caſe was, a Record taken before eight, this was to be removed up into this Court, and upon the certifying of it, it appeared, that the Record certified, and removed, was taken before nine, whereas the Record to be removed was taken before eight, and ſo the Record, certified, and removed, was not the Record, which was to have been certified, and this matter was aſſigned for error. Yelverton at the Bar argued, that this was erroneous, for that this cannot be taken to be the ſame Record, for the Record, proceedings, and judgement to be certified, was taken before eight, and this which is removed, makes mention of a Record taken before nine, and therefore it neither is, nor yet can be the ſame Record. John Moore argued to the contrary, upon this Reaſon, that the greater number contains the leſſer, but not on the contrary. Flemming chiefe Juſtice, the Record certified to be taken before eight, and being removed, it appears the ſame to be taken before nine, and ſo not the ſame. Yelverton Iuſtice, all the proceedings at Durham, are by Commiſſion, and there may be two ſeverall Commiſſions, the one before eight, and the other before nine. Williams Iuſtice, If there be here any error at all, there is ſufficient warrant for us, to proceed to examine the Errors, the Record being here before us: as to the Earl of Leiceſters caſe in Plowdens Comment fo. 392, 393. in caſe of an Inditement, the Judgement was there reverſed by a Writ of Error. In this caſe the Record being now before us, and erroneous, a Writ of Error ought to be *De Recordo, quod coram vobis reſidet*. The Commiſſion directed to nine, the Writ of Error makes mention but of 8. the recitall is, that the Judgement was before 9. & certified to be before 8. this is erroneous. Flemming chife Iuſtice, the writ is here directed to certain perſons, by their names,

Error upon removing of of a Record. The Records to be removed, was taken before 8. and being removed, it appeared to be taken before 9.

names, and they are to certifie ſuch a Record, and their names, or elſe, they are to certifie that there is no ſuch Record, if they certifie part, but not all, may we proceede upon this, and take this now for the ſame Record, this is doubtfull, but it is better for them, and the ſurer way, the Record being now certified, and here before us, to have a Writ of Error *de recordo quod coram vobis reſidet*. The whole Court agreed clearely in this. Williams Iuſtice, we may alſo proceed here very well upon this error, upon the Record that is now before us, in this manner, as well, as if the Record had been well removed. All the Iudges agreed in this clearely, that the Record was now here in Court, and therefore the Rule of the Court was, that they ſhould begin again *de novo*, in a Writ of Error *de recordo quod coram vobis reſidet; quod nota.*

A Writ of error, de recordo quod coram vobis reſidet.

## The Lord Candiſh Plaintiffe againſt the Earl of Shrewsbury Defendant.

IN a Writ of Error to reverſe a Iudgement given in *Communi Banco* in an Action of Debt conditioned pur payment el money plead perfoymance generally; the Plaintiffe pleads *Non ſolvit*, iſſue joyned upon this and tryed, and Verdict, and Iudgement was there given for the Plaintiffe, and to reverſe this Iudgement, a Writ of Error brought, and for Error aſſigned, that there was a miſtriall, for that the *venire facias* was not well awarded, wherein the Caſe appeared to be this, that by the condition of the Bond, the Money was to be paid at the South Porch doore of the Pariſh-Church of Hauck-Hucknoll, the *venire facias* was De vicineto de Hauck-Hucknoll, whereas, (as it was objected) the ſame ought to have been, De parochia de Hauck-Hucknoll, and this was aſſigned for Error, wherein the queſtion was, whether the *venire* ought to be, De Hauck-Hucknoll, or De parochia de Hauck-Hucknoll. Yelverton Iuſtice, the *venire* ſhall never come of an Adjective. In this caſe it was urged, that the Pariſh was never in queſtion, but the Porch only. Yelverton at the Barre, there is no preſident for to warrant this exception here againſt the tryall. Yelverton Iuſtice, the like exception was never taken. It was Objected, that here was no Town, nor yet Pariſh named in the Record, nor in the Condition, and therefore this was a miſ-tryall Yelverton Iuſtice demanded, whether Hauck-Hucknoll were a Town or not. Anſwer was made that it was a Town. Crew Serjeant, that this was a miſ-tryall, and ſo the Iudgement erroneous: En ſon Declaration, he ought to expreſſe a place certain, from whence the venire to come, if it ſhall be here intended to be within the Pariſh, then the *venire facias* ought to have been de parochia, Hill. 7. Jac. Bragg againſt Carter in Debt, it was laid to be apud parochiam, de magno Burſtad, no Town named, the *venire facias* was de magno Burſtad, and held good. Hutton Serjeant, If the condition was to be paid at his Manſion Houſe, of the Mannor of Dale, this extent is ſufficient to make a good iſſue, and it ſhall be intended to be a Town. Flemming chiefe Iuſtice, where the payment is to be made at his Manſion Houſe, of the Mannor of Dale, there if the *venire facias*, be de Manerio, this is good; but if it be Dale, it may be queſtioned whether this would be good or not, he thought it would not be good, here in this Caſe, the payment is to be at the South Porch of the Pariſh Church of Hauck-Hucknoll, and the *venire facias* ought to be of a place certain, if it had been de Parochia de Dam, this had been good, for that no Pariſh Church can be without a Pariſh, if the *venire facias* had been De parochia, and no Town named before, this had been good, but if it had been of a Town where none named before, and not de Parochia, this had not been good. Yelverton Iuſtice, where he alledges Hauck-Hucknoll this ought to be intended to be a Town, there is here no Town by name alledged but the Pariſh Church of Hauck-Hucknoll. Croke Iuſtice, if the *venire facias* here had been of the Town, the ſame had not been good, but being here De vicineto de Hauck-Hucknoll, this is good. Williams Iuſtic, a Pariſh is a place from whence a *venire facias* may well be awarded, but it is not ſo, of a Citie, or a Forreſt, a Pariſh is a place more generall; parochia is thus defined to be a place in

In a Writ of error to reverſe a judgement given in the C. B. in Debt, error that there was a miſ-tryall.

*Object.*

Hill. 7. Jac. Bragg againſt Carter.

which, *populus alienus Eccleſiæ* are reſiding, if a payment of money be to be made in the Temple, Church, the *venire facias* ought not here to be of the Church, but *De Parochia de St. Dunſtans* in this principall caſe. Yelverton, and Croke Juſtices held the tryall good, and the *venire facias*, De Vicineto Haucke Hucknoll was well awarded. Flemming chief Juſtice, Williams, & Fenner Juſtices held the contrary, afterwards at another time this matter was moved again, and George Croke argued, that the *venire facias* was well awarded. It ſhall not be here intended, that the Pariſh extends it ſelf further then the Town of which the Pariſh hath its name. In Throgmorton and Tracyes caſe in the Com. fo. 149. where the Abbot of the Monaſtery of Tewxbury, apud Tewxbury prædictum made a Leaſe, it is there ruled, that Tewxbury was the Town, and apud Tewxbury prædict. this is to be in *villa prædicta*. In this Principall Caſe, Haucke Hucnoll ſhall be intended to be a Town, and this is named, the *venire facias* is well awarded: the Town and Pariſh here is all one. Thomas Crew, the *venire facias* in this caſe was not well awarded, as to the pleading here, the payment is to be made at Haucke Hucknoll, videlicet, *in Auſtrali porticu, Eccleſiæ parochialis de Hauck Hucknoll*, the *venire facias* was of the Town. As to caſes of intendments, it is to be intended, the Town, then the *venire facias* to be of the Town, if it be of the Pariſh, then the *venire facias* to be of the Pariſh, and if of the Caſtle, the *venire facias* ſhall be of the Caſtle, Hill. 7. Iac. B. R. Rott. 1312. Bragg Plaintiff againſt Carter in Dette; no Town there named but London, this preſident is to prove, that where the queſtion was *De magno Burſtad*, and not *De parochia*, the opinion of the Court then was, that where it is named to be in the Pariſh, there the *venire facias* is to be *De parochia*, or it is not good, but otherwiſe it is, where it is to be done, at the City of Dale, or at his Manſion Houſe in Dam: there the *venire facias* is to be of the Town. Yelverton Iuſtice, of what place ſhould the *venire facias* here have been. Croke Iuſtice, payment of money is to be made, at the Market Croſſe in the Town of Dam: the *venire facias* here ſhall be De Dam: Walter, the *venire facias* is here well awarded, & ſhall be good, and this being now tryed, is not to be aſſigned for error, the Law will intend this tryall now to be, where it ought duly to be, and 31. Eliz. B. R. Benridges Caſe adjudged here accordingly, where the caſe was in an Action of Dette, for rent, that was reſerved upon a Leaſe, the iſſue was tried, where the Action was brought, it was alleaged in this caſe, that this was a miſ-triall, but it was adjudged, that this was well tryed, being a thing tranſitory. Yelverton Iuſtice, here is a good iſſue well tryed, and the *venire facias* well awarded, and this follows the words of the Condition, payment pleaded, and this denyed, hereupon they are at iſſue, and this well tryed, I never did ſee any *venire facias* to be awarded *De Vicineto ville de Dam*, but *de Dam*. If the *venire facias* here ſhould have been *De Parochia*, of what Pariſh ſhould this be, a Pariſh cannot be in a Town, but a Town may well be in a Pariſh: this *venire facias* here is well awarded, and ſo no error in the Judgement, but the ſame ought to be affirmed. Fenner Iuſtice, it is to be here intended, that there is ſome other place, then the Pariſh, when he ſaith here, Haucke Hucknoll; this ſhall be intended to be the Pariſh, and the *venire facias* to have been here of the Pariſh, but where the Town is firſt named, there the *venire facias* ought to be of the Town, but as it is here in this caſe, where the reference is to no other place, but unto the pariſh, as in this caſe it is, there the *venire, &c.* ought to have been awarded, *De parochia*, and not of the Town, and ſo the ſame was miſawarded, and this being now aſſigned for error in the judgement, the ſame is erroneous, and for this error to be reverſed. Williams Iuſtice it is the ſoundeſt, and beſt pleading for to lay the Town firſt. If money be to be paid in the Temple, Hall, or Church, this in pleading is to be laid, to be *apud parochiam ſancti Dunſtani*, videlicet, at the ſtone in the Temple, Church, and this is ſo uſually done: a Pariſh may be of a place and of a Town, *eſt locus ſed non villa*. In Cornwal, there are 20. towns in one pariſh, and it is not to be doubted, but that a *venire facias* may be awarded of a Caſtle, *venire facias De vicineto Caſtrie de B.* and this was adjudged

Hil. 7. Jac. B. R Rott. 1312. Bragg Plaintiffe againſt Carter Defendant.

31. Eliz. B. R. Benridges caſe adjudged

adjudged here to be good in 41. Eliz. and so where a thing is laid to be done at the Manno⁊ of Dale, the *venire facias* is not to be here awarded de Dam, but *de manerio de Dam*, where there is a Parish and a Town named, there the *venire facias* shall be of the Town, but if no Town be named, there it shall be of the Parish, the Parish is very uncertain, if a Parish be named, the other may say, that there are divers Towns within this Parish, as Sam and Dam; if one pleads in avoidance of an outlary that it was in Dam, *absque hoc*, that it was in the Parish of Dam; the *venire facias* is here to be *De Parochia*. If a payment of money to be made at the Church doo⁊ of St. Dunstans, a *venire facias* cannot be awarded from hence, but from the place where it was made, in this principall case the *venire facias* was misawarded, and so a mis-triall, and the Judgement fo⁊ this cause erroneous, and to be reversed. Croke Iustice, that the *venire facias* in this was well awarded, and the issue well tryed, and the Judgement to be affirmed, and the difference will be, when the Parish is named by way of distinction, o⁊ separation, there the *venire facias* shall be of the Parish, but not otherwise. *Parochia* originally is where many Houses are set together, but where the Parish is named by way of denotation, or explanation, where the place lyeth: where the money is to be paid, there the *venire facias* is to be awarded of the Town, as here in this case, the Parish is named only by way of explanation, where the place of payment alledged to be, the same being to be made at the South Po⁊ch doo⁊ of the Parish Church of Haucke Hucknol, the *venire facias* here is well awarded of the Town, and so no mis-triall, but the Judgement to be affirmed. Flemming chief Iustice: this is a great and a very difficult case, and very wo⁊thy of a conference with all the rest of the Judges fo⁊ the certaine setling of this doubt, this is a very good argumentable case on both sides, the *venire facias* is to be awarded in such manner, as by the course of Law the same ought to be, a *venire facias* awarded of a Fo⁊rest cannot be good, in asmuch as this is a place only fo⁊ wild beasts, within a ville, o⁊ Parish, are most trials, if no Town appear, then the *venire facias* is to be *De parochia*, but where a Town is named, there the *venire facias* shall be awarded of the Town. At another time afterwards (s) Termin. Hill. 8. Iac. B. R. the Court being divided in opinion, Flemming chief Iustice, being moved to deliver his opinion in this case said, that—he had moved the Judges at Serjeants Inne fo⁊ their opinions in this case, and that the better opinion of them there was, that the *venire facias* was well awarded, and that he himself was also of the same opinion, that the *venire facias* was well awarded, and the Judgement well given, and not erroneous, and so by the Rule of the Court, three Judges against two, Judgement was affirmed fo⁊ the defendant in the writ of Erro⁊.

41. Eliz B.

Termin. Hillar. 8. Jac. B.R

Judgement affirmed by the Court.

## *Wood* Plaintif against *Ingersole* Defendant.

An action of trespasse and ejectment entred Pasch. 7. Jac. B.R. Rot. 155.

In an Action of Tresp asse and ejectment upon the construction of a Will, a speciall Verdict being found, upon which, the Case was this, a man having three Sonnes, and being seised of Lands in three Counties, in Fee simple, makes his will, and thereby deviseth one parcell of his land in one County to his eldest Sonne, another parcell in another County, to his second Soune, and another parcell in the third County, to his third and youngest Sonne, and by his said Will expresseth further, that his will is, that if any of his Sonnes do dye, that then, the one of them to be heir unto the other, afterwards the Father dies, the eldest Sonne dyes, having issue a Sonne, the question was, who should now have this Land, which the eldest Sonne had, upon his death, whether his Son, being his heire, o⁊ his two Brothers, being the Uncles. Yelverton Iustice, the question here only is, fo⁊ that parcell of land which was devised to the eldest sonne,

and

and for no more. Harris at the Barre argued, that the issue of the eldest Sonne should have the Land, and not the Uncles. In Hamletons, and Hamletons case, which was Mich. 29. & 30. Eliz. & C. B. where the like devise was made to three men, there it was held they should be Joyntenants. In Wildes case Coke 6. pa. fo. 16. 17. where it appears, that in case of a Will, one word in severall, shall make severall estates, to severall respects, as where a devise is made to one, and to his Children, if he hath no Children, at the time of the Devise, that then this is an Estate taile in him, for that the intent of the Devisor, here, is manifest and certaine, that his Children should take, and the words shall be taken as words of limitation, but if he had Children at the time, there this should be a joynt-estate for life and no more, 19 H. 8. fo. 9. b. that the intent of every last Will, shall be taken according to the intent and meaning of the Testator, where the same appears not by expresse words, as a Devise made of Land to one imperpetuum, or to sell, give, or do with it at his pleasure, this shall be in him a Fee simple, for so was his intent, and so is 7. E. 6. Br. cases fo. 94. pla. 432. and 7. E. 6. Br. cases fo. 94. pla. 431. if a man hath three Sonnes and deviseth his Land in this manner (s) one part to his first Sonne, another part to his second Sonne in taile, and another part to his third Sonne in taile, and that none of them shall sell any part, but that each shall be heire to the other, if one of the Sonnes dyes without issue, his part shall not revert to the eldest Sonne, but shall remaine to the other, and for that the words (that each shall be heire to the other) implyes a remainder, being in the case of a Will, which is to be intended to be according to the intent of the Devisor, 2. Eliz. Dyer pla. 170. Frenchams case, devised Land to his Wife for life, the remainder to C. F. and to the heirs Males of his body, *& si contingat illum obire sine hærede de corpore*, then to H. and his heires Males in fee simple, the remainder to the next heires Males of kin, adj. that the *si contingat* doth not alter the Taile, because the intent of the Devisor is apparant in the principall case, it is repugnant that the Brother should have this Land, living, the issue of the eldest Sonne, this principall case, is in case of a Will, and upon construction to be made thereof, the words here are, that if any of the Sonnes dye, that the one shall be heire to the other, and how this may be, is the matter considerable, the word heire, shall not here make any inheritance, the eldest Sonne here hath the inheritance, and he hath fee simple, in his part in possession, and a fee simple in reversion in the other parts. Williams Justice, what estate is here devised, this limitation here is meerely void, it doth not appear by this Will, what the Devisor meant, it being altogether uncertaine, and so void in Law, a Reason of this, may be made upon the Statute of 34. H 8. cap. 5. a devise is to be made to some person, or persons, and to this purpose is the case in 14. Eliz. Dyer fo. 303. pla. 49. where a limitation by Will to a Sonne in ventar sa mare is not good. Coke 5. pa. fo. 68. Cheneyes case, a man hath two Sonnes, named John, and deviseth land to John his Sonne, this is a meere void devise, for the incertaintie of it, *tota curia* except Flemming chiefe Iustice agreed with him, for this being in the case of a will, the Law will make this good. Flemming chief Justice, as to this Devise here when one of the Sonnes dyes, the reversion is in his heire; as to the words in the Will, That if one dyes, that the one shall be heire to the other, this is but an estate for life, here are three Sonnes, Devisees, in this case, it is to be considered, what estate they have by this Will, they have no such estate with a remainder over, as to make any disposition thereof. If a Lease be made to Husband and Wife, the remainder for forty one years to the survivor of them, neither of them here can say certainly, which of them shall have this Lease for forty one years in remainder, it being uncertain which of them shall survive the other, here in this Principall case, the Eldest Sonne being heire, may well have an Action of Waste, for Waste done; as to the latter words in this Will, (that

Hamelton, &c. Hameltons case Mich. 29. & 30. Eliz. in C. B.

Coke 6. pa fo. 16. 17. Wildes Case.

19. H. 8. fo 9. b old Reports.

7. E. Br. cases fo. 94. pla. 432 & 431.

2. Eliz. Dyer ple. 107. Frenchmans case.

14. Eliz. Dyer fo 303. pla. 49

Coke 5. pa. fo. 68 Cheneyes case.

(that the one shall be heire to the other) these words are not meerely void, and idle, for they may have some thing by his Will, but no estate of inheritance, in as much as these are words, only of limitations of an estate precedent, which of them here shall first die, the others to succeed him, but not for the inheritance, but if he have Issue, the Issue is to have the same, here is an interest passed, but not such a one as is grantable by one, nor is the same in the other, but is *in nubibus*. Yelverton Iustice, this is a strange Case, by the death of the devisor; a Fee simple is descended unto the Eldest Sonne, in his part, to him devised, and also the reversions, of the parts in Fee simple, he hath Issue a Sonne, and dyes, shall this now go from him, it shall not, an Estate in Fee simple, descends here unto him executed, either both of them, which survive, or neither of them, shall have this in remainder, we ought here to make such a construction, & to gather the meaning of the Testator, out of the words of the Will it self, & in this case here, the heire of the eldest Son shall have this Land, rather then any of the other Brothers. Croke Iustice of the same opinion, that in this case cleerely, the Issue of the eldest Sonne, shall have this Land, and not the two surviving Sons, by the Rules of Law, if there be any repugnancy, and incertainty in a Devise, there this devise shall be void, and here in this Will there is a plain repugnancy, and therefore the Devise in this shall be void, it appears by the case in 19. H. 8. Old Reports fo. 8. 6. when the intent of the Testator in his Will doth not agree with the Rules of Law, there this intent shall be void, as if a Man Devise Land to A. in Fee, and if he dyes without heire, that B. shall have the Land, this Devise is void to B. for that one Fee simple cannot depend upon another, by the Rule of Law, in 27. H. 8. fo. 27. it is there cleerly agreed, that if Land be Devised to a Man, and to his Heires Males, the Devisee hath an Estate Taile without other words, for that the Law is favourable to all Devises, and will construe them according to the intent of the Devisor, and for this Reason the Devisee here shall have an estate taile, (otherwise it is in case of a Grant.) If a man devileth Lands to his Sonne, and to his Heires Males, and if he dyes without Issue, that his second Sonne shall have the Land, this shall no wayes enlarge the estate, but that his Heir Male shall have it, as before it was limited, here it is not certaine, what Issue shall have it, and therefore the Limitation is void, and idle, and that for want of a sufficient Declaration of his intent, for if the youngest Sonne happen first to die, who shall have this Land, by this limitation here, it doth not appear, and therefore the limitation is void, and idle, and the Issue of the eldest Sonne shall have the Land, after the death of his Father. Flemming chief Iustice, if the Will may stand good to any intent, such construction ought to be made to uphold the will, if it may be. This Case was afterwards moved again, and Hill. and Bakers case cited, which was 37. Eliz. B. R. Rott. 382. where the Devise was, as in this Principall Case, and the eldest Sonne there dyed first, after his Father, having Issue a Sonne, as in the Principall Case here, and the better opinion of the Court there was, that the Issue of the eldest Sonne should have the Land, and so in this case now here in question, the opinion of the Court was, that the Issue of the eldest Sonne should have the Land upon the death of his Father, and not the two surviving Uncles: and it was further agreed, that the Reversion of the Inheritance is in the Sonne of the elder Brother, and that the others have only Estates for their lives, by the Scope, Meaning, and Construction of this Will, and so the Opinion of the Court was for the Issue of the elder Sonne, being Defendant against the Plaintiffe, who claimed under the Title of the surviving Uncles, and by Fenner, Williams, Croke, & Yelverton Iudges, the will is good to the Eldest Sonne, and that his Issue shall have the Land: and that the subsequent Clause in the Will, after the particular devises, (s.) (that the one shall be heire to the other) is repugnant in it self, to the other part of the Will, and so the same Clause is meerely void in Law, and therefore Judgement was given by the Court for the Issue of the Eldest Sonne, against the two surviving Sonnes, and that

19. H. 8. Old reports fo. 8. 6

27. H. 8. fo. 27. Old reports. 37. Eliz. B. R.

Hill. r. against against Baker Defendant. Rott. 382.

Judgement for the Defendant, quod Quærens, nil capiat per billam.

that by four Iudges against Flemming Chiefe Iustice, who seemed somewhat to doubt of it, the judgement thereupon entred by the Rule of the Court, *quod Querens nil capiat per Billam.*

## *Praunce* Plaintif against *Tuckle* Defendant.

Praunce Plaintif against Tuckle Defendant. Pasc. 8. Jac. B. R. Rott. 138. in trespasse.

IN an Action of Trespasse, the Plaintiffe declares that the Defendant did enter and brake his Close, Chase, and drive his Cattell to his Dammage of, &c. The Defendant pleads and justifies *quoad Intrationem & effugationem*, (but pleads nothing as to the breaking, a Verdict given for the Defendant. George Croke for the Defendant, the justification is good, and so prayed judgement for the Defendant, according to the Verdict given for him. Yelverton at the Barre prayed judgement for the Plaintiffe, for that the justification here is not good, for that he hath not answered all the matter laid to his charge, he ought here to have answered to the breaking, as well as to the entrie, and therefore the justification is not good, and prayed judgement for the Plaintiffe. Williams Iustice, the Defendant here ought to answer and make his justification in the same Manner as the Plaintiffe hath declared against him, and to have pleaded unto, or made his justification, *quoad intrationem & fractionem* as well as *effugationem*, and the Plaintiffe is of necessitie to declare so, or else his Declaration had not been good. Fenner, & Yelverton Iustices agreed with him, that the justification is not good. (Croke Justice doubted of it) and the Court agreed, Croke Justice except) that the justification here is not good, without answering to the breaking, and chasing, and according to this resolution, Judgement by the rule of the Court was entred for the Plaintiff.

Judgement entred for the Plaintiff.

## *Simpson* Plaintif against *Claye* Defendant.

Simpson Plaintiffe against Claye Defendant, Pasch. 8. Jac. B. R. Rott. 27. in trespasse.

IN an Action of Tresplasse, for beating, wounding, and imprisoning of the Plaintiff, the Defendant pleads not guilty, as to part (s.) as to the beating, and wounding, and as to the other Part (s.) imprisoning, the Defendant justifies, that what was done by him, was then so done as a Constable, and in the execution of his office, and so justified, the Jury found the justification good: but finde nothing of the other matter, to which not guilty was pleaded, and yet they assesse Dammages to the Plaintiffe, for the wounding, for which they did not finde the Defendant guilty, and so the Jury gave dammages, for that which was not found by them which was void, there being no ground for them to give these Dammages, and so by the Rule of the Court, this giving of dammages for the wounding, which was not found, is erroneous, and the Judgement of the Court was therefore for the Defendant, *quod Querens nil capiat per billam.*

Judgement for the Defendant, quod Querens nil capiat per billam.

*Burgesse*

## *Burgesse* Plaintif against *Standish* Defendant.

Burgess plan. against Standish Defen. Pasch. 8. Jac. B.R. Rot. 640. in Debt for 20: s. rent.

IN a Writ of Error to reverse a Judgement given in the C. B. in an Action of debt there brought for Rent of 20.s. and upon *Nil debet* pleaded; verdict and Judgement was there given for the plaintiff; for the reversing of which Judgement, a Writ of Error was brought, and the error assigned was, For that the Declaration was not good, the Action being in debt for 20. s. Rent, and doth not shew in his Declaration, how this Rent did grow to be due, as he ought to have done; and so for this omission in the Declaration (being so materially to be alledged) the Declaration was not good, and the Judgement there given for the Plaintiff, in this cause erroneous; and to be reversed. *Curia*, all agree, this omission in the Declaration to be a cleere errour, to vitiate the Declaration, and so the Judgement for this cause erroneous: and by the rule of the Court, the Judgement was reversed.

Judgment reversed per curiam:

## *Tittleby* Plaintiff against *Adams* Defendant.

A Writ of error.

IN a Writ of Errour for to reverse a Judgement given in an inferiour Court at Bristoll; In an Action of debt: Judgement was there given for the Plaintiff against the Defendant, being a surety, and the Judgement was, *Tam de debito Predicto quam de* 20.*s. costs.* Upon this Judgement a Writ of Error brought; the first error assigned was, for that the Judgement was given against the Surety, whereas there was no Judgement given against the principall, 2. error, that no Judgement being given against the principall, the Judgement against the Surety, *tam pro debito, quam de* 20.*s.* costs, is erroneous, 3. error. For that the Judgement was, *Quod sit in misericordia*, whereas he did not appear, that there was any appearance to warrant the Judgement, *Quod sit in misericordia.* George Croke for the Plaintiff, for these errours, prayed the reversall of the Judgement. Yelverton, that the Judgement was well given, and not erroneous, for that all is here ayded, and made good, being layd to be according to the custome there used in Bristoll, and the proceedings there, warranted by the custome: by the which custome where the party sued, being there summoned, appeared not; he was by the custome there, to be attached *per bona*, so that there was no Discontinuance here, as it was objected; for that no day was given unto him by any rule, and so there being no appearance, there could be no Discontinuance. 2. As to the Error assigned, for that the Judgement was given for the costs; this is grounded likewise upon the custome, which warranted this to be good; for this is layd to be *Secundum consuetudinem*, and this is parcell of the Judgement for the costs. As to the Third Error in the Judgement, *Quod sit in misericordia*, as to this, the same is likewise warranted by the custome. Fenner Justice, If he pleads not the custome, hee shall not be ayded by the Custome. *Curia*, all agreed, that the Judgement given for the costs, was good; and that in this case, *secundum consuetudinem*; being pleaded, this shall ayde all defects. Fenner Justice, Bristoll follows London, *et easdem habet libertates.* as London had. If a man sells his goods by fraud, these goods are not to be attached by the custome; and so likewise it is, if by fraud he doth convey: No custome is here alledged for the Judgement to be *Quod sit in misericordia.* Yelverton Justice. How could the Judgement be against him? *Quod sit in misericordia*, against him who never was any party to the Action. Fenner Justice; the first Judgement is alleadged to be *secundum consuetudinem*; and so ought also the second Judgement to be. *Curia*, the whole Court, agreed cleerly in this, that this judgement being *Quod sit in misericordia*, whereas he never appeared; this is a clear and an incurable Error: and so for this error only, the judgement is erroneous, and so by the rule of the Court, for this Error alone, The Judgement was reversed.

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Judgement reversed by the Rule of the Court:

## *Neale* Plaintiff againſt *Sheffill* Defendant.

*Neale* Plaintiff againſt *Sheffill* Defendant: An Action of Debt upon an Obligation entred *Tr.* 8. *Jac.* B.R. *Rot.* 742.

IN an Action of Debt upon an Obligation. Upon Oyer demanded of the bond, and of the condition, the condition appeared to be this; that if the Defendant ſhould pay ſuch a Sum of money, unto the Plaintiff on the birth day of the firſt childe of the Obligee, that then the Obligation ſhould be void; the Plaintiff to intitle himſelf to have the Action, ſets forth in his Declaration, that the childe was borne, the money not paid; and for this cauſe the Action was brought: the Defendant pleads in barre, that after the bond entred into, and before the birth of the Childe, the Plaintiff accepted of the Defendant (one loade of Lyme) in full ſatisfaction of the ſaid debt, and in full diſcharge *dicti ſcripti obligationis*: And upon this plea, the Plaintiff demurred in law: and the Defend. joyned in the Demurrer: and whether this Plea, as the ſame is pleaded, be good, or not in Law, or not, was the queſtion. Upon which Plea, the onely point inſiſted upon, was, whether this acceptance of the ſaid Loade of Lyme, before the birth of the Childe, by the Plaintiff, of the Defendant, in ſatisfaction of the Debt, be a good and a ſufficient diſcharge of the debt, in Law, or not: It was argued for the Defendant; That this acceptance of the load of Lime, before the birth of the Childe, ſhould be a good diſcharge of the Debt, and to this purpoſe was cited the Book of 37. H. 6 fol. 26.

37. *H.* 6. *fol.* 26.

In an Action of debt for payment of money at a day to come; and before the time he accepts of ſome other thing in full ſatisfaction of the Debt: this ſhall barre him of his action (be it either by payments, acquittance, or by acceptance of that, which amounts to as much, as a payment, being an acceptance in full ſatisfaction; this will be good, as appeares, by Coke 5. pa. fol. 117. a. in Pinnets Caſe. And by 4. H. 8. Dyer. fol. 1. where the condition of a Bond is collaterall, there the acceptance of another thing in ſatisfaction, is no good barre, but contrary it is, where the condition is to pay money. Yelverton at the Barre, that this acceptance of the loade of Lyme, before the Childe borne, is no diſcharge of the debt, or any ſatisfaction at all for the ſame, for that the ſame was done, after the Bond entred into, and before the birth of the Childe; and ſo the ſame done before any debt did grow due; for that no debt here growes due untill the birth of the Childe. Fenner Juſtice. This acceptance could be no ſatisfaction, becauſe that no debt was due at this time. Yelverton Iuſtice. In caſe of a bond for to pay money, at a time to come, the ſame is a debt, and a duty preſently, but not demandable till the day, or the time here of the birth of the Childe; the ſame is a duty preſently, but the time of payment may be deferred; but notwithſtanding this, the ſame remaines a debt, and a duty preſently: as if one be bound by bond, conditioned for to pay money when I. S. ſhould come from beyond Sea: This is a debt, and duty preſently: but the payment thereof onely deferred for a time, and that by the expreſs words of the Condition; but this doth not alter the Debt, it ſtill continues to be a debt, and a duty preſently, upon his entring into the bond; Here in this Caſe, the Defendant pleads the acceptance of this Loade of Lime, for to be in *plenam ſatisfactionem dicti ſcripti Obligationis*. This cannot be a diſcharge of an Obligation by words, but by writing: he might well have pleaded this acceptance of the Loade of Lyme, by the Plaintiff in full ſatisfaction and diſcharge, of the ſum of Money, mentioned, and contained in the Condition of the Bond; and this had been good: but then he ought to have pleaded it ſo; and that this was accepted of by the Plaintiff in full ſatisfaction, and diſcharge of the Sum of Money, in the Condition of the Bond, mentioned, to be paid; but not to have pleaded, as it is done in this Caſe, viz. that the acceptance of this Loade of Lime, was in diſcharge *Dicti ſcripti Obligationis*, which is too ſhort, and no good pleading; and ſo for this cauſe the Plea in barre is not good, and the Plaintiff had good cauſe to Demurre in Law unto it: and ſo the Demurrer good, and the Plaintiff hath good good cauſe to recover his Debt. Croke Juſtice, of the ſame opinion; The Plea here in Barre is not good: It is very cleer,

*Coke* 5. *a. Pa. fol.* 117. *a.* an *Pinnets* caſe. 4 *H.* 8. *Dyer. fol.* 1.

that

that this is a debt and a duty presently, though not to be paid till a certain time to come. And this appears to be so by Littleton in his Chapter of Releases fo. 118. Pla. 512. and 513. and Coke 8. pag. fol. 153. and in Edward Althams case: it is debitum presently. And may well before the time of payment be discharged by a release. Fenner Justice: the plea here of the Defend. is not good, for that it is no debt till the childe be borne. Williams Justice; the binding by the obligation here makes a debt and duty presently. And the payment mentioned, to be made in the condition of the bond, this is not performed here by matter in fact, by payment of the money, but by the acceptance of a Load of Lime pleaded to be in satisfaction and discharge, *dicti scripti obligationis*, this is not good, but if he had pleaded, that this had been delivered, and accepted of by the plt. in full satisfaction, and discharge of the summe of money mentioned to be paid in the condition of the bond, this had been then a good plea in barre, but not as it is here pleaded. Curia all agree with him herein that this plea in barre, as it is here pleaded, is not good to barre the Plaintiff of his action, and therefore by the Rule of the Court judgment was entred for the Plaintiff.

*Littleton* ch. Releases fol. 118. pla. 512. and 513. & Coke 8. p. fol. 153. *Althams* case.

Judgment by the Rule of the Court given for the Plaintiff.

## *Lymbey* Plaintif against *Hemmurse* Defendant.

IN a Writ of error to reverse a Judgment given in the Court of Marshalsie in an action of debt, there brought, upon an *Indebitatus assumpsit*. The error assigned for to reverse the Judgment there given, was this, because that the Plaintiff there in his Declaration, did not shew the cause, how this debt to the Plaintiff did grow due, as he ought to have done. Curia, this is a clear error. For he ought to have shewed in his Declaration, the cause of the debt, and how it did grow due unto him, and for this omission, the Declaration is not good, and so the Judgment there given erroneous, and for this only error, by the rule of the Court the Judgment was reversed.

*Lymbey* Plan. against *Hemmurse* Defen. A Writ of error entered. *Pasch.* 8. *Jac.* B. R. Rott. 206. Judgment reversed by Cur.

## *Denton* Plaintiff against *Stocke* Defendant.

IN a Writ of error, to reverse a Judgment given in an inferior Court, in an action of debt upon a bond, conditioned for payment of money, which by the condition of the bond was to be paid, at a day to come. *In portion Capelle de Middleton*, upon payment pleaded by the Defendant, issue was joyned upon *Non solvit*, and the *venire facias* was awarded De Middleton. Verdict and Judgment was given for the Plaintiff, and a Writ of error brought for to reverse this Judgment. The error assigned was that this was — a mis-tryal, for that the *venire facias* was not well awarded. Curia clear of opinion, that this was no mis-tryal, but that the *venire facias* here awarded De Middleton was well awarded, that the verdict and judgment was well given for the Plaintiffe, and therefore by the Rule of the Court *Nulle Contradicente* the Judgment was affirmed.

*Denton* Plan. against *Stocke* Defend. in a writ of error.

The *Venire facias de Middleton* well awarded.

Judgment affirmed by the Rule of the Court.

Note upon the Statute of 2. E. 6. Chap. 13. made for setting out of tithes. In a prohibition to stay proceedings by a Parson, in a suite, in the spiritual Court brought by him against one of his Parish, for hindering of him in his way, in the carriage of his Tithes. Curia all agreed in this, that if a Parson hath his usual way stopped, that so he cannot come to take away his Tithes being set out for him: he may well sue for this in the spiritual Court, and there have his remedy. But if the question be whether the Parson be of right to have a way, (f.) one way, or

*Stat.* 2. E. 6. cap. 13. for setting out of Tithes.

In a prohibition upon a suite in the spiritual Court for the stopping of his way.

or an other, this is tryable by the Common-Law, and not in the spiritual Court, but if the Parson have a certain way granted to him, and set out by the Common Law: if he be at any time disturbed, and hindered, by any of his parishioners, or by any other in the use of this his way, he may then in such a Case well sue in the spiritual Court for his remedy. And the words of the Statute of 2. E. 6. Chap. 13. are, that if any Parson be disturbed, stopped, or hindered, in the carrying away of his Tithes, so that the tith comes to be lost, hurt, or impaired, in this case he may sue in the spiritual Court for his remedy, and upon due proof there made thereof, he shall recover double value of the tith so taken, or lost, besides his costs and charges of suite. But because in this principal case, the Parson sued in the spiritual Court, for the right of his way, whether he was to have that way or not, which belonged properly to the common Law, and not tryable there in the spiritual Court, and for this cause, the Court granted a prohibition to stay their further proceedings in the spiritual Court.

Prohibition granted *per Cur.* to stay proceedings in the Spiritual Court.

## *Flewellin* and others Plaintiffs against *Rave*.

*Flewellin* Pla. against *Rave*. An action on the case Sur Trover & Conversion, grounded on a disceit.

IN an action upon the case Sur Trover & Conversion, grounded upon a disceit, the case appeared to be this. That where there was A. B. and C. A. was indebted unto C. in such a summe of money. And B. in such a summe was indebted unto A. It was agreed between A. B. and C. that B. in discharge of his debt unto A. should discharge the debt of A. unto C. in paying and delivering unto him certain commodities which he then had in his hands, and possession, being properly the goods and commodities of A. and which B. by and with the consent of A. did assume, promise, and undertake, to deliver them unto C. in discharge of the debt of A. unto him, and C. was contented to accept thereof. According to this agreement made between them, either B. did not according to his promise, and undertaking discharge the debt of A. unto C. by delivery of the goods unto him, but contrariwise, did convert them unto his own use. After the death of A. and for this C. brought his action upon the case for a trover and conversion, grounded upon this disceit. And whether this lieth or not is the question. Curia, the whole Court agreed clearly in this: that the action is well maintainable, for if a man bayle goods to one, for to bayle them over to another: if he to whom this baylement was thus made, to bayle them over, contrary to the trust in him reposed, doth not deliver them over, as he was to have done, but doth convert them to his own use, he hath by this his deceit, made himselfe liable to an action, both of the first baylour, and also of the party to whom they were to have been bayled over, and either of them may well have his action against him for this. And notwithstanding the third person here to whom the goods ought to have been bayled, had never the possession of them, yet this Conversion and non-sesance, of that which he ought to have done, is a wrong, and very prejudicial to C. the third person. And for this wrong and prejudice, he may have his action upon the case, as well as the first baylour. (but both of them shall not have their actions.) But he that first begins his action, shall go on with the same. Curia the whole Court also agreed clearly in this —— that this not bayling over, and delivery of the goods by B. the first baile unto C. in satisfaction of the debt of A. and according to the agreement made between A. and B. that this doth clearly amount in Law to make a conversion. And that by this, he hath made himself subject, and liable to an action, to be brought by the party to whom he should have delivered the goods. Williams Iustice, if a man delivers a deed to one, to deliver the same over to another, and he doth not deliver the same over accordingly, the party here to whom the deed was to have been delivered, may well have his action for this not delivery of the deed unto him, and with this agrees the case in 28. H. 8. Dyer. fol. 20 & 21. pla. 125. & 228.

in

in the Grocers caſe of London, by Mountague: there, if a man delivet mo-
ney to bayle this over, if the baylee doth not performe the condition, he is by this
a debtor of the money, or accomptable, at the pleaſure of the baylor. And there
pla. 128. in every receipt, two things are included, (s.) either the receipt is
to the uſe of the baylour, or to the uſe of a ſtranger or his own uſe. If the ſame
be to the uſe of a ſtranger, then he is his debtor, becauſe that the propertie is not
in the baylee. Curia, the whole Court agreed in this, that the action brought by
C. the Plaintiff, againſt the Defendant, being the firſt baylee, for not bayling
of the goods unto him according to the agreement, was well brought, and that
here was a good converſion in Law, and ſo by the rule of the Court Judgment
was given for the Plaintiff.

Judgment given for the Plantiff by the Rule of the Court.

In an action upon the caſe brought for ſlanderous words the caſe was this.
The Defendant ſpake theſe words to the Plaintiff himſelf. (s.) Thou art a
perjured fellow, thou hadſt 10. l. to take a falſe oath, and therefore thou art a for-
ſworn fellow. Whether theſe words are actionable, was the queſtion. Yelver-
ton Iuſtice, that they are not actionable, for he may take the money and not take
the oath. Williams Iuſtice, thoſe words are ſcandalous, being a great ſcandal to
his name, credit, and reputation, and a blemiſh, and diſcredit unto him, and
therefore actionable. Fenner Iuſtice, that the words are actionable, if one ſaith of
another, thou didſt aſſault me on the high-way to rob me, theſe words are ſcanda-
lous, and actionable. So here in this caſe the words are actionable.

In an action of the Caſe for words.

## *Rowland Egerton* Plaint. againſt *Edward Morgan* and others Defendants.

IN an Appeal brought for the death of his brother, killed by Morgan. In which
appeal, the the Plaintiff declared againſt the ſaid Edward Morgan, againſt
Morgan his brother, and againſt one William Robinſon, but for that they were
not to be found (as by the Returne of the Sheriff appeared, he proceeded onely
againſt Edward Morgan. Henry Yelverton at the Barre excepted againſt the
Writ, *quod minus ſufficiens in lege exiſtit*, to enforce the Defendant to anſwer
the ſame, and ſo Demurred in Law to the Writ. The Court gave day for the
argument, ſaying that when they gave their Iudgment upon this Appeal, the
ſame Iudgment ſhould have Relation unto this day, and that the day by them gi-
ven for the argument of this Appeal, is but only a day of grace. Afterwards
Yelverton beginning to argue, ſaid that he would ſpeak for Morgan, and therein
he would alſo helpe the others in the Appeal. For if the Appeal be not good againſt
Morgan, but ſhall abate, the ſame ſhall be then alſo abated, againſt the others.
The Writ here, is *minus ſufficiens* to enforce the Defendant to anſwer, and
therefore he pleaded over to the felony. The Writ as it is now in Court, is not
ſufficient. *In favorem vitæ* which the Law hath of a man, it ſo provides that
the Writ of Appeal ought to be moſt exact, and more exactly pleaded, then any
other action, and if the ſame be once abated, it ſhall not be afterwards revived. It
appears by Stamford lib. 2. fol. 82. that an Appeal ſhall abate for falſe Latine,
or for default of forme, and to this purpoſe is the caſe in 13. E. 3. Fitz. tit.
Corone pla. 121. Wherein the Writ of Appeal, the word (*Habeas*) was left
out, and for this omiſſion the Writ was abated without any amendment. By all
which it appears, how favourable the Law is to the life of a man. In the Ap-
peal was ſhewed the weapon, with which the party was killed. In what part of
the body the wound was, the longitude and latitude of the wound. It was praye-
ed that the appearance of Morgan might be as well upon the Indictment as upon
the Appeal. The Recorder of London prayed, that they might proceed upon
the

*Egerton* Pla. againſt *Morgan* An Appeal.

*Stamford* lib. 2. fol. 82. 13. E. 3. *Fitz. tit. Corone* Pla. 121.

the Indictment notwithstanding the Appeal was hanging. Exceptions being taken to abate the Appeal, but because they had not the exceptions ready to deliver into Court, the Court did much dislike of it, for that a plea pleaded in abatement of a Writ, ought to be shewed presently, and therefore the exceptions were shewed. Man Secundary Informed the Court, that if they shewed not their exceptions presently, the plea did then amount to no more then to a not guilty. The plea here is, that the Writ is *minus sufficiens*, to cause the Defendant to answer. They ought to shew wherein: Geo. Croke for the Defendant, this ought not to be done with this difference if it be matter in Law, there he needs say no more; but *minus sufficiens*, but if it be matter in fact that is alledged, there he ought to shew what the same is. The whole Court did agree this difference to be good Law. The prisoner was bailed, and the——bayle was taken body for body. Afterwards Henry Yelverton argued for the Defendant, that the Writ of Appeal was not good, and so the Appeal ought to abate. The Writ here in Court, is a blank Writ, (album breve) (s.) without any return at all, and therefore not to be answered, the Writ not served at all. You declare, we come in, and the Writ not served, and so in this insufficient. It appears by the returne that the Writ was directed to the Sheriff of Middlesex, returnable Octob. Michael, at which day the same ought to have been returned.——The words of the returne are these, (by vertue of this Writ to me directed, I have taken the body of Edward Morgan, whose body I have here ready in Court, at the day, and as for the other two *non sunt invent. in ballivo nostro.* And at the end of the returne was set down.——*Responsio vic. Sabastian.* Harvey, &c. Cokeine. They returned this, but they were not then Officers to the Court, nor to the King, and so enabled to make the returne, and therefore the returne insufficient. The Writ was directed *Vicecomiti*, and so ought the returne to have been by the Vic. none can make a returne of a Writ, but such a person, who at the time of the returne remained an Officer to the Court. If the old Sheriff be removed before the day of the return, the new Sheriff is to make the returne, and to this purpose, is the Book of 22. E. 4. fol. 33. and 34. in the case of a Writ of Error, to reverse a false judgment given before the Major and Sheriffs in the Court at Coventry, and Coke 3. pag. fol. 72. Westbyes case, where it is resolved, that after the Election of a new Sheriff, and before delivery over of the Prisoners to him, they do remain in the custody of the old Sheriff, and after the delivery of them over to the new Sheriff, he at the day of the returne, ought to returne, *Cepi Corpus*, but in this case, the returne by the new Sheriff before any delivery over of the Prisoners to him by the old Sheriff, is no returne at all in Law. And the old Sheriff can now make no returne, he being no Officer at all to the Court, but the new Sheriff is the officer to the Court and ought to make his answer unto the Kings Writ to him directed, and he doth not here returne a *Cepi corpus*, but onely an Endorsement in this manner, setting his hand also to the returne, with this Poscript, (s.) This Writ as it is above subscribed, I the now present Sheriff, have received from my Predecessor the old Sheriff, going out of his office, and this upon the matter is no returne at all. Prices may in some case be awarded unto the old Sheriff for to bring in the body of a Prisoner, but that is in case where before he hath made a returne of *Cepi corpus, & paratum habeo.* And afterwards he is removed and a new Sheriff made, upon the non-appearance of the Prisoner, Prices shall in this case goe to the old Sheriff but not otherwise. Where the old Sheriff is removed, the new Sheriff ought to make the returne. Here the new Sheriff hath made a returne, but the same is not good, being but of parcel of that which he ought to have returned. For as to the other 2. his returne is *Non sunt invent. in ballivo nostro.* this his returne is not good. For that he ought to have said, that those 2. nor either of them were to be found. An apppeal may be commenced, either by Bill, or by Writ, and where it is by Writ, as appeareth in the old book of entrees tit. Appeal. de mort. f. 46. Pasch. 33. H. 6. Rott. 39.

22. E. 4. fo. 33. 34.

*Coke* 3. pa. fo. 72. *Westbyes Case.*

Old book of entrees *tit. Appeal de mort.* fo. 46. *Posch.* 33. H. 6. Rott. 39.

there

there the Writ of Appeal is a Writ conditionall (s.) if he finde pledges, that then he ought to attach the body of the party, and there Pledges were put in, the Appeale was there brought by a Woman for the death of her Husband at the day of the return, the parties appear in Court, at which day, the Sheriff *non misit inde breve*, the Plaintiffe prayed to have another day for to declare, and for the Sheriff to bring in his return, the Defendant prayed that the Plaintiffe might now proceed against him, and declare, this being the day of the Return, there it was holden by the Court, that if the Party did not declare on the day of the Returne, the Appeale is then lost, and therefore, by the Order of the Court, the Plaintiffe was to declare, notwithstanding, the Sheriffe, had not made his return, but because no Writ of Appeal was served and executed, by reason whereof *versus eum de jure narrare non potest, petit breve Sicut plurimum vic. com. praedict dirigendum* for to attach the body, and to have him there, and die, &c. and that he may not be put to declare in the Appeale before the Writ be served, executed, and returned, and the Defendant being ready in Court to answer the Plaintiffe in the appeale, if he would declare against him, and in regard the Plaintiffe refused so to do, he prayed that he might be discharged of the Appeal, and for this cause it is there ruled, that the appeal should abate, and the same there was accordingly abated, this Case may well be compared to the present Case now in question, for that here in effect is no return at all, made by the Sheriffe, and this is the Cause of the Demurrer here. If the Sheriffe makes his return, and doth put his hand to the writ, cleerely this is not good (but it is said) that the old Sheriffe did put his hand to the Writ, if he were at that time, he was out of his office, and so he was no Officer to the Court, and so it is in effect, as if he had not put his hand at all to the return, and so the return, being as no return in Law, is meerely void, but now it is to be considered, whether the hand of the new Sheriffe to the Writ, shall aid it, and make it good, it shall not, for that he hath made no return at all, in his own name, for he doth not say, *Cepi corpus, nec, paratum hic habeo*, as he ought to have done, and therefore all this appearing so to the Court, it was prayed, that this Writ (being *minus sufficiens in lege*, to enforce the Defendant to answer to the same) may for this cause be abated. Geo. Croke, the Writ is not good, First, where it is said, *& fecerit nos securum de clamore suo prosequendo, &c.* this is not good, for that he doth not shew as he ought to doe, in what Cause this was in, and between what persons, this is omitted in the Writ, and therefore not good. Secondly, For that in the Appeale, he hath named himself, *frater*, and doth not say, as he ought to have done, *frater, & hares*, First, he names himself—*hares*, but this is only by way of addition, but in the point of the Writ, he ought there to have said likewise, *hares*, but this is omitted, and so for this omission the Writ is not good. Note, that these two latter exceptions were over-ruled, and rejected by the whole Court, afterwards this Case solemnly argued by all the Judges——Croke Justice, this is a Case of great consequence, and importance, Life on the one side, and on the other side, *Revenge, alter sanguinis, strictum jus* is to be rendred to them both. Exceptions have been taken, some to the Writ, some to the Return, and some to the Act of the Court. As to the exceptions taken to the Writ, no just exception hath been taken to the same, but that this Writ remaines good, notwithstanding all the exceptions taken to it, yet the exceptions were very forcible. First exception, because it is not shewen against whom the plaint was, as to this *ex praecedentibus, & consequentibus*, this being considered, this is good enough, and a perfect Declaration, *in quo clamore, & versus quem*, this was, if you lay all together. Secondly, Because it is not expressed in the Writ, *Cujus hares ipse est*, this is sufficiently expressed in, and by the Premises, the course of the Chancery is so, *& Cursus Curiae, lex Curiae. Cursus Cancellariae Lex*, and this is very true, the Writ is briefly alledged, for the avoiding of Tautologie in this, *& dicitur breve, quia rem breviter enarrat*, and the Rule of the Law is this, *quod necessario intelligitur id non deest*,

1.

2.

Exceptions to the Appeal

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3. *deeſt.* Thirdly, As to the Return, this being *Sanct.* Michael. and doth not ſay proxim. futur. as to this, this ſhall be intended to be ſo, and it is not the courſe of the Court, ſo to mention this, for that the Law ſuppoſeth it ſo to be: theſe are not exceptions of ſubſtance, for to overthrow the Appeale. Another exception taken to the Return of this Writ, and this is grounded upon the Act of the Court, as touching the validity of this Appeale, in the Law this was dated Tr. 18. Iunii retornable in 8. Mich. next enſuing, the old Sheriffe took the body, and returns a *Cepi Corpus infra Comitat. cujus corpus paratum habeo*, and for the others *non ſunt in meo ballivo*, the new Sheriffe, *iſtud breve ſic mihi deliberat fuit in executione, &c. officii*, and the others are not, if this be good—that this is good, and the old Sheriffe, as to this, is a good Officer to the Court, and may well bring in the body, *Cujus Corpus deliberari* to the new Sheriffe—the old Sheriffe remaines an Officer to the Court, untill he be diſcharged by a Writ, *De exoneratione Officii*, untill this Writ comes to him, he remaines an Officer to the Court, and a Writ may be directed to him, that he by Indenture, ſhall deliver all manner of Executions—over to the new Sheriffe, and therefore there is a notable Caſe, that if he do not deliver the Cauſes alſo, but the body only without the Cauſes, that this ſhall be an eſcape in him, if the old Sheriffe returns, a *Cepi Corpus, & paratum habeo*, if the Priſoner appear not at the day of the return, a Diſtringas ſhall be awarded to the old Sheriffe, ſo that the old Sheriffe may well ſay in his return to the Court, *paratum habeo*, for that he ſtill remains a ſufficient Officer to the Court, to return this next as to the truth of the return, *Corpus paratum habeo*, when as by the Record here it appears, that he was bayled, whether this ſhall make the return bad, that it ſhall not, but that the return is good, this, notwithſtanding this intervenient Act (of Baylement) makes the Caſe the more intricate—*ea occaſione reddidit ſe*, it may be doubted, whether he may ſo do, when the Proces was in the ſame Court, it may well be, and he may well here be taken, upon the return of the Sheriff, and upon this the Court may proceed, ſo that notwithſtanding all the the exceptions that have been taken, the Appeale remaines good, and the Court may well proceed upon the Appeale. Williams Iuſtice, The Declaration here is againſt Morgan, *Comparentem hic in Curia*, who takes notice of it, and demands oyer el Bre. and a Demurrer is to the Writ, and to the other matter pleads *Nient culp.* ſo that now we are to ſpeak to the validity of this Writ, whether the ſame, as it is, be good, or not, ſome things urged *ut amicus Curiæ*: the Court is not bound to look into any thing, but into that, of which a doubt may be made. Firſt, therefore it is to be conſidered, whether this 1. Writ be good, or not. Secondly, whether the return here by the Sheriffe, as 2. the ſame is made, be good, or not. Thirdly, whether here be any partie in Court, 3. againſt whom he may declare in the Appeale. Fourthly, whether any intervent- 4. ient Act hath prejudiced the Cauſe any wayes. Firſt, as to the Writ, it is ſuch, 1. as was error at the beginning, and there is no other forme for the ſame, and there is no Book for to warrant theſe exceptions, as have been taken, all the matter is contained in the Writ, and therefore it is called, *breve, quia rem breviter enarrat*, it ſets forth the intention and meaning of the parties, this—*pro clamore proſequendo—cujus hæres ipſe eſt*, this ought not to be expreſſed in the Writ, and this is very plain, that the Writ is good, notwithſtanding this, *proxim. futur.* in many Caſes this is to be ſo, but it is good in this Caſe, as it is expreſſed, and to 26. Aſſ pla: 3. this purpoſe is the Caſe in 26. Aſſ pla. 3. An Aſſiſe was diſcontinued, by the not coming of the Juſtices. An Attachment awarded to ſummon him to appear, and it is not to be expreſſed to be a *Curiam proximam futuram*, and here for this omiſſion the ſame fell to the ground, but it ſhall not be ſo in caſe of an Appeale, for the Law intends this, that it ſhall be the next enſuing, without expreſſing of it, ſo that the Writ remains good, notwithſtanding theſe exceptions, and the Demurrer being generally to the Writ: which being good, the Demurrer is at an end, and falls to the ground: the Writ and the return here, are but one entire Record

in

in Law. Secondly, as to the return here, this is good in Law, for before the Statute of Yorke made 12. E. 2. cap. 5. Rastall Returnes of Sherifs fo. 345. pla. 3. no name was used to be put to the Return of the Writ, by the Sherif, nor yet by any other Minister, or Officer, which was conceived to be inconvenient, whereupon complaint was then made of this in Parliament, and upon this it was ordained by the same Statute, that the Sherif should put his name to every return made by him, but otherwise it was, before this Statute made, but now since this statute the Sheriff ought to put his name to every return by him made, the which if he shall omit to do, this will make the return erroneous, these things are here considerable, (2.) First, the return: Secondly, the Act of the Court. First, as to the return, as it is here made, the new Sherif thus returns, *Sic indorsat. sint mihi deliberat.* both at the time, and since, this is a good return, and, as the case was, it could not be otherwise, something was here done by the old Sherif, in his time, and some thing by the new Sherif, each Sherif is to make answer, for what was done in his time, the old Sherif was still chargeable with the body of the Prisoner, and each Sherif to certifie to the Court what he hath done, as to the Exigents in the C. B. and here for so much as hath been done by each, to be certified accordingly, and for the rest, that to be with a *Sic indorsat. fuit*, and what each hath done, a return is to be made of it to the Court, who are to judge of the return, and therefore the old Sherif (as to some purposes, is, and still remains an Officer to the Court, and of some things, acted, and done by him, the Court is to be certified by him of the same, and by his return, if there were no Sherif, and yet he makes a return, this is void, and to no purpose, but otherwise it is here in this case, where it appears, by matter of Record, that he was Sherif by the Records, here it appears, that every Sherif ought for to make his return to the Court, of that which he himself hath done, and of that which the other hath done, the old Sherif is an Officer to the Court, after a new Sherif chosen, as appears by the Book of 22. E. 4. fo. 33, 34. for the Law takes notice of the old Sherif, that he by the Writ to him, takes to him the body, and returns a *Cepi corpus*, and all this is entred of Record Trinit. 11. H. 4. fo. 82. Fitz. tit. Return el vic. pla. 53. Bre. el vic. to enquire of waste, who returnes *quod mandavi Balivo meo libertatis, qui nullum dedit mihi responsum*, for this cause the Sherif was amerced, and a a *sicut alias* awarded, for that by this Writ he is Judge, and hath power to enter into the Franchise, and in 33. H. 6. in a Writ of Annuitie, a return was made by the old Sherif, *quod nihil habet*, this—return he made, as an Officer of the Court, & he may well be amerced, for his false return made when he was Sherif, and this is usuall here so to be done, the return of the old Sherif in such a case is good, for that every one ought to beare, and support his own burden, so in this principall Case, the Writ is good, and the return well made by the old Sherif. But posito that the Sherif had put in no writ—The Appellant comes at the day, and the other appears, this shall all be now made good by this, for this hath been agreed, that he is the same person, and now all former defects, and insufficiencies by the apparance are made good, if the Sherif return *mandavi ballivo, & quod nullum dedit mihi responsum*, and afterwards the partie appeares, this is good cleerely, in 8. H 4. fo. 21. In an Appeale, if he appears, and agrees that he is the same person, this is good, and sufficient, in L. 5. E. 4. fo. 69. In a personall Action in the C. B. Proces continues till the Capias upon which the Sherif returnes *Cepi corpus, & languidus in prisona*, and afterwards upon the Writ of *Duces tecum*, the partie appears before the Writ returned, and prayes that the Plaintif may count against him, and for that the Plaintif could not deny but that he was the same partie, but said, that he had no day in Court, untill the Sherif had returned his writ, the which he hath not as yet done, and it was ruled by the Court, that the Plaintif should declare against him presently upon this his appearance, & prayer to have him declare, & the partie was bayled, & agreeing with this is the book of 33. H. 6. in the old book of Entrees Rot. 39. In an Appeale in this Court by a Feme, for the death of her Husband, at the day of the *Alias*, *vicecomes non misit breve*, and the Defendant came, and prayed that

2. Stat. of Yorke 12: E: 2: chap: 5: Rastall Returnes of Sherifs fo: 345: pla: 3:

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22: E: 4: fo: 33, 34:

Tr: 11: H: 4 fo: 82: Fitz: tit: Return el vic: pla: 53: 33: H: 6:

8: H: 4: fo: 21:

L: 5: E: 4: fo: 69:

33: H: 6: old Book of Entries Rot: 39:

the Plaintif might declare against him, agreeing himself for to be the same person, it is there agreed that the Plaintif should either then declare, or the Appeal to be lost. And so in this case here, you allowing of him, to be the same person, what is now to be done, it is to be considered. If upon demand, he shall say, that he is not the same person, this peradventure might be materiall, but not here, as this Case is, because it is here confessed, and agreed, that he is the same person, so that no materiall doubt, or Objection can be made, and this Case is here agreed
2. to be, and so the Writ here is good, and the Returne is likewise good. Secondly, In the next place, the Act of the Court, is to be considered, it hath been said, that in the body of the Record, the very Writ is recited, and that he, *reddidit corpus suum ut in custodiam mariscalli—reddidit,--- & ea occasione est in custadia mariscalli* he defends this, here is the Writ, and upon this an appearance in
27. H. 6. 27. H. 6. there the partie appeared gratis, and was bayled, and had a Supersedeas, and if Morgan the Prisoner here had prayed this, he might well have had it, the Court did here upon bayle him, *de die, in diem*, so that he going by Main-prise, none can declare against him *ut in custodia mariscalli*, but he ought for to be in his
Trinit. 7. H. 6. fo. 41, 42. 9. E. 4. fo. 27. custody, and so is the Book case in 7. H. 6. fo. 41. & 42. he ought to be in his custody, or no Declaration can be against him, and there it is said, that if a man be let at Main-prise, *de die, in diem*, no man shall have a Bill against him, as against a man that was *in custodia*, and so when he is bayled, it being all one: but yet the party is still *in* custodia to some purposes, and so is the Book of 9. E. 4. fo. 27. if he declare against one, as *in custodia mariscalli*, and he is not in his custody, this is not good, the Case there was in a Bill of of debt against the Lord Ferrers, *in custodia mariscalli*, the Bill was challenged, for that the Plaintif had not found any pledges, and the Lord being out of custody, the Plaintiffe would have found Pledges there in Court, but could not, because the Bill was abated: but in an originall Action by Writ, although he have not found pledges to the Sherif, yet he may here find Pledges in Court, and so is the diffecence but by the Book of 18. E. 4. fo. 9. b. by all the Justices en Bank Le roy. It is there agreed, that if in any Bill, or Writ, Pledges are left out, that the Plaintif at any time, hanging the Plea, may find Pledges, for that this is in the discretion of the Justices, and is but matter of form, 2. H. 7. fo. 2. It was moved En Banke Le roy, where one is Plaintiff by Bill, against one *in custodia marescalli*, and the Defendant emparles till the next Term, the Bill being viewed, the Plaintif had not found Pledges, it was there questioned, whether he might then put in pledges or not, and held that he might, and accordingly Pledges were entred: a difference there was taken between a Bill and a Writ, for the Writ is, Si le Plaintif fecerit te securum, &c. and so is not the Bill. If a man be endicted of felony, and is bailed, appears by Mainprise, *extra custodiam marescalli*, and therefore he cannot declare against him, 11. H. 4. fo. 7. 6. In an Appeale of Mayhem, the Plaintif counts, and the Defendant makes his defence, and afterwards saith, that the Writ was not served, for that the Sherif had not returned Pledges, &c. and therefore he ought not to be put for to answer, there it is said, that Pledges are to be put in, and that this may be aswell done in Court, as to the Sherif, and when the partie appears he may put in pledges in Court, and the Defendant is to answer, otherwise it had been; if the Defendant had not appeared, there he ought to have been brought in by Process. In the Principall Case here, Morgan appears in Court, and takes notice of the proceedings against him in 18. El. Dyer, fo. 348, 349. pla. 14. an angry case between a Baron of the Realm, and a Noble man. In an appeale by Howel de morte fratris sui versus Fortescue, and others. Fortescue appears, the others not, the Paintif counts against the others as Principals, and against Fortescue, as accessarie before, and after the felony, Fortescue, who appears and pleads in abatement of the Writ, that there was no such William Harrison de M. (against whom the Appeal was brought as Principal) *in rerum natura* the day of the writ purchased, nor at any time after (the truth was) the name of Baptism was mistaken, (s.) William H. for Thomas H. it was held in this Case by the two Chief Justices, that although there was another William H. in another County, if it

Note the difference between a Bill and a Writ originall, as to the finding out of pledges.

18. E. 4. fo. 9. b. Pledges but matter of form.

2. H. 7. fo. 2. & fo. 17.

Note the difference between a Bill, and a Writ as to pledges.

11. H. 4. fo. 7. 6.

18. Eliz. Dyer pla. 348, & 349.

The return of the Sherif may be traversed by the Defendant, in favorem vitæ.

be

be not in the County of Buck, where the ville of M. is, or if he were dead before the Writ purchased, the Plea is good, and that *in favorem vitæ*, the Defendant may Traverse the return of the Sherif. In the Principall case here, the Writ, and the Return are both good, and the Defendant appearing, and taking notice of the proceedings against him: there is no sufficient reason can be given, why the Defendant should not answer, and receive his Tryall. Yelverton Iustice, the Defendant here prayes oyer of the Writ, and of the Return thereof, the Writ of Appeal here is good, the Pledges are nothing, where the Partie is in Court at the day of the Return, he may appear, and the Sherif may well make his return in 22. the Book of Assises pla. 3. where a Writ comes to the Sherif, which is to be served by the Bayley of the Franches, the Sherif here ought first to take pledges, before that he writes to the Bayley for to serve the Writ, this is there so held by Sharde, that the Sheriff *de jure*, ought to take pledges as before, but by the Reporter, the Bayley may well take pledges *de prosequendo*, but it is very cleere, that pledges may well be taken, either in the Court where the return is, or before the Sherif, and this is usuall: as to the exception taken, because it is *Octabis Mich.* and doth not say *proximo futur.* this is good, notwithstanding this omission, for that it shall be intended to be the next, and so it is usuall: as to the Objection made, because he doth not say in the Writ, *frater, & hæres*, this is good, and needs not to be in: and it had been but Surplusage, if it had been so, for in the beginning, he names himself to be *frater, & hæres*, and this is sufficient, and the conclusion is good, *ad respondendum prædictum Rowlandum, de morte prædic.* this is good, and so the Writ, as it is here, is cleerely good. But the great point of difficulty here in this Case, doth rest upon two matters of the Return as to the Appeale, and whether the same be discontinued or not, wherein consideration is to be had. First, To the Return of the old Sheriff; and Secondly, to the return here of the new Sheriffe: the Return here appears judicially to the Court, and the Court ought to take notice of it, and to have a due consideration of the same, although they are informed of this, by one only, *ut amicus curiæ*, here is no good return made in this Case by the old Sherif, for that he is now antiquated, being out of his Office, and so no Officer to the Court, neither can the party come in upon this return, if the name of the old Sherif had been only to the Writ, it had then been a good plea for Morgan to have said, that he was no Officer, and that the return was not made by an Officer of the Court, so that the Return made by the old Sherif, is no good return in Law at this day, but it is said, that the new Sherif here made the return, as to this, if the return made by him was in the name of the old Sherif, this is not good, as to his return here, nothing at all is here returned, as done by him, he saith nothing at all of the body of the Prisoner, but only mentions here, an indorsement upon the return, the partie ought not to appear upon this, the same being no ground nor warrant for his appearance, the Declaration here against him is, (as in *Custodia Vic.* and the new Sherif had him not in his custody, nor yet the old Sherif, it doth not appear here by this return, that the Prisoner was at any time *in custodia* of the new Sherif, unlesse by the Indentures between them, it appeares that he was by the old Sherif delivered over to the new, as it appeares Coke 3. pa. fo. 72. in Westbies case, the Plaintif here cannot declare against him, as being *in custodia* of of the old Sherif, for that he is now no Officer to the Court, neither can he here declare against him, as being *in custoda* of the new Sherif, for that he never had his body in his custody, delivered to him by the old Sherif, but yet he remaines with him, and no Distringas here shall be awarded to the old Sherif, to have the body of the Prisoner in Court, because that he is no Officer to the Court, and herein the Difference will be this, if the Sherif returns at the day *Cepi corpus*, and have not the body ready, he shall then be amerced, and a Distringas shall issue to the Coroners. Secondly, if the old Sherif at the day returns *Cepi corpus*, and that before the day of the return, he was removed, and a new Sherif made, the Distringas here shall be awarded to the new Sherif, (if it appears upon record, that he hath

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22. the Booke of Assises pla. 3.

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Coke 3 pa. fo. 72. in Westbies case.

Note the difference in the returns, and where the Sherif is to be amerced.

hath taken the body, but not otherwise. If the Sherif returns *qd mendam ballivo*, who answers *quod cepit corpus*, and brings him not in at the day, he shall be amerced, and a Distringas shall go to the Bailey of the Sherif for to bring in the body by him taken: In the Principall case here, the return as it is made, is not good: here the partie Defendant hath appeared gratis, the Question now is, whether this his voluntary appearance shall make all to be good, which was otherwise defective upon the Return, this his appearance shall not make the same good, for that the Plaintiffe here ought to declare against him, upon some Writ, or not at all: if the Defendant had pleaded here generally, to the felony, he might then have well proceeded to the tryall of him, but where he appears, in this Case he doth, and demurres unto the Writ, otherwise it shall be; then in the next place, it is to be considered of here, whether this Appeale be discontinued or not. As to this, the Appeale here is cleerely discontinued, the Defendant was in *custodia marescalli*, the last Terme, at the suite of the King, *& occasione prædict.* he rendred himself to the custody of the Marshall, and *octabis Michael.* he was bayled, how ought the Plaintiffe now to declare against him, a man cannot be, at one and the same instant of time, a prisoner unto two (s.) to the Marshall, and also to the Sheriffe, they being two severall Officers to the Court, he cannot be a Prisoner unto them both, if the Law be, that he is not in *custodia* of the Sheriff, but of the Marshall, then he ought to declare against him accordingly, and so upon the whole matter, the Returns here of the Sherifs, are neither of them good, and the Appeale here is discontinued, and that so the same, by the judgement of the Court ought to be quashed. Fenner Iustice, First, as to the exception taken to the Writ, because it is not said *filius, & hæres* in the conclusion of it, as to this, the same is no good exception, but the Writ is good, this exception notwithstanding. Second exception, because it is *octabis Mich.* and doth not say *proximè futu.* this is no good exception, for where a man is bound to pay money at the Feast of St. Michael. this by intendment shall be said to be the next Michaelmas after the date of the Bond, a *fortiore*, it shall be so taken and intended here in this Case, to be *octabis Mich.* next ensuing, so that the Writ is cleerely good. Thirdly, as to the return of the Sheriffes, the return here of the old Sherif is a bad, and an insufficient return, for he hath not performed that which he ought to do, here it is said, he took the body, and would have the body, this is not good, but he ought to have said, that he had taken the body, and that he had delivered the body over to the new Sheriffe: if he had said, that he would keep the body, when as he was not Sheriffe, this shall be in Law taken for an escape: the Law requires of the old Sheriffe, when there is a new Sheriffe made, that he ought then for to deliver the body of the prisoner to him, and there is no president in Law, to warrant this, that the Old Sheriffe shall make such a return without his delivery over of the body to the new Sheriffe, the old Sherif is not then Sheriffe, and how then shall he say, *cepi corpus & paratum habeo*, whereas this is an escape in him, he cannot keep, and detain him in prison, when he is no Officer to the Court, how then can he say, *paratum habeo*, when he is no Sheriffe, neither can the Court upon this award, that he shall be in prison, because that this is no sufficient return, the same being made by one, who is no Officer to the Court, but is now out of his Office, there being a new Sheriffe made, where the Sheriffe returns, *Cepi corpus, & paratum habeo*, and brings him not in, then the Writ of *Duces tecum*, shall be awarded, for to have the body in Court, and that to be *sub pœna*, the Return, and the Writ, is but one Record, and this being so, if the one be bad, so shall the other be likewise. In the next place, as to the appearance here, of what force, and validitie, the same here is to be considered, as this case here is, the appearance of the Defendant unto this Writ, is as nothing at all, for for that he here appears upon the Main-prise, but not unto the Writ, and if he appear not, he forfeits his Recognisance, so that he comes in, and appears here gratis, and that is, for to save the Mainprise, but he appears not unto the Writ, but if he will

The Appeale discontinued.

3. Exceptions to the Writ.

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will, he may appear here to the Writ, and he may also refuse so to doe, if he please, but in the Case remembred, of an Appeale brought by the Wife, for the death of the Husband, and both of them appear, the Defendant prayes, that the Plaintiffe may declare against him, and this the Plaintiffe ought to doe, for that there is no remedie to make him to appear, but there is good remedie for to make the Defendant to appear (s.) by processe of outlary, and so it stands in such a case; whether he will appear or not, and he may well refuse, if he be demanded for to appear; but otherwise it is, of the part of the Plaintiffe, for the Defendant hath no other remedy, for to make him appeare, if he deny so to doe, but only when they are both of them present in Court, to pray the Court to order, that the Plaintiffe may then declare against him, and then upon this prayer of the Defendant, the Court will enforce him to proceed, and to declare against him. As to the last matter considerable in this Case (s.) the Declaration of the Plaintiffe in this Appeale, whether this be good, or not, as to this, the Declaration is insufficient, and the none appearance will make the same good, that the Declaration is insufficient, for that in the Declaration is an Appeale, the hour ought to be therein as certainly expressed, as any other time when the wound was given: and in this Declaration, First, the same is laid to be *Circiter*, or *citra horam undecimam*, this is no certain designing, either of the day or hour, and therefore the Declaration for this uncertainty, in this particular is insufficient, for that not only the day of the death, but the hour also ought to be certainly expressed and set down in the Declaration, the which is not here so done, the day being expressed, but not the hour, the same being only alledged to be, *Citra horam undecimam* which is not good, being altogether uncertain, and so the Declaration for this uncertainty, is insufficient, and the Appeal ought to be quashed. Also the Declaration here, is his own Allegation only, and no matter in this of the other part, and therefore his Allegations therein ought to be certaine, but herein he hath failed, and for this cause the Declaration is insufficient, and so the Appeale ought to be quashed. Flemming chief Iustice. An Appeale is in Law to be very strickly looked into, so that no error be in it, neither in the Writ, nor in the return of it, nor yet in any meane Processe in the same, nor in the return of the same, nor yet in the Declaration upon the Writ of Appeale, the Iudgement here in this is finall, and peremptory, and not to be reversed, but in Parliament, and if the partie be hanged first, and the Iudgement afterwards reversed by a Writ of Error, what will this avail the party: as to the matter here, and the proceedings in this Case, the partie hath been attached, and upon this attachment *comparuit*, he hath appeared, and being here personally in Court, the Plaintiffe hath proceeded, and declared against him; upon this, the Defendant Demands oyer of the Writ, and of the return thereof, he now appears and takes advantage of this, and nothing can be here said against it, but that here is a good appearance, he being brought in by the attachment, and so he comes in by the Writ, being thereby attached, the matter now to be considered in this case, is whether the Defendant shall be now enforced to answer unto this Writ, the same being insufficient in Law, as to this, cleerely, he shall not, but it is without question, that his appearance nowhere is upon the Writ, and upon the Attachment, he hath demurred hereunto, and this *non ut amicus Curiæ*, but this is done by him, *in propria persona sua*, and this his appearance is good. *Comparet*, whether this shall now be taken to be an appearance upon both, or upon this, which is, *& paratum habeo*, this is in another term, and another Record also, and it is not good, for the Court to seek out Records of another Term, not yet to look into them. First, Iudges are to proceed *secundum allegata, & probata*, and are not to go any further. Secondly, there ought to be an averrement here for to make these agree together, 1. *reddidit se*, and the Court bayles him, Secondly, the Return is, *Cepi corpus, & paratum habeo*, how these two can stand well together, is to be considered. In an Action of Trespasse, a Capias issues to the Sheriffe, who returnes *Cepi corpus*, if at the day, he doth not appeare, then a *Duces tecum* shall be awarded to the same

Sheriff

Sheriff, continuing in his place, but if he be removed, then the Writ shall go unto the new Sheriffe, and a Distringas may be directed *nuper vicecomiti, ita quod habeas corpus*: if a new Sheriff be elected, before the other hath made his return, and the new Sheriff informes the Court, that the old Sheriff hath taken the body, *Et non curat mihi liberari*—the Defendant appears in person, and prayes that the Plaintiff may declare against him, if this appearance of the parties shall reconcile, and make good the return of the Sheriff, or not, is considerable in L. 5. E. 4 fo. 69. a Capias is directed to the Sheriff, who returnes *Cepi corpus, & Languidus in prisona* at the day, the Sheriff doth not appear, but the partie appears, not upon the return of the Sheriff, but he appears at the day, upon his own accord, and prayes that the Plaintiff may declare against him, this is there well argued, and it is there said, that this appearance of the partie gratis, the Court ought not to receive, for that the partie was then in Prison, and came in, and appeared gratis, without any satisfaction given to the Court, how, and in what manner it is could be, that he should be at large, and yet in prison at the same time, *Simul, & semel*, this being contrary to the return of the Sheriff, who returns *Languidus in prisona*, as to this it may be answered, that this may be well, for that the body in prison, by the Statute may be bayled and so at large, and appearing, being bayled, that he is the same person, it is there ruled in that Book, that the Plaintiff should presently declare against him, upon this his voluntary appearance, and this is the Judgement of that Book, but it is now to be considered, whether it shall be so in this case of an appeale, or not the Sheriff here cannot take bayle, here the partie hath appeared, without question, as upon the return of the Sheriff, it is true, that he hath appeared, upon this Appeal, he hath been attached upon it, he appeares and demurres unto the Writ, and here the question will be, whether we may now look into the Writ, and examine the validity of the same, and also, into the return of the Sheriff, as the same is before us, and into the Declaration, all which the Court may well doe: First, as to the Writ, the which is good and sufficient, notwithstanding all the exceptions taken against the same, Octabis Mich. without saying, *proximo futur*: This shall be intended cleerely to be so, without this particular expression, as to the next exception to the Writ, because hee doth not say *frater, et hæres*, this is more then addition, and intitling by, he saith that he doth appeale him, *de morte fratris sui* and this is sufficient, so that the Writ of Appeale here is cleerely good. Secondly, As to the return of the Sheriff, the same being *virtute istius brevis mihi directi, Cepi corpus, & paratum habeo*, this the Return made by the old Sheriff, and his hand set unto it, and so deliver over the Writ unto the new Sheriff, who makes his return in this manner, (s.) *recepi istud breve, sic indorsatum*, he comes in by the Writ, by which he was taken by the new Sheriff, for none can return a Writ, with a *Cepi corpus*, but he which is an Officer to the Court, and not the old Sheriff, for that he is not any Officer to the Court, but the new Sheriff is, for now, after a new Sheriff chosen, no processe is to be served, nor any return to be made, but the same is to be done by the new Sheriff, and no return is to be pleaded, but that which is made by the new Sheriff, and not by the old, as to the old Sheriff, he ought for to deliver over all the Writs in his hands, being unto the new Sheriff whether the return here made, be good or not, is the question, and herein, as to Returns made by Sheriffs, it is to be considered, whether this insufficient return, shall any wayes prejudice a Writ well brought, whether he shall receive prejudice by the mis-return of the Sheriff: and here it is to be considered in what cases the Originall, being well brought, and yet the Sheriff shall be amerced, and new Processe to be awarded, and it is likewise to be considered, whether this shall be so in Cases of Appeales, what shall be done in such Cases, and what in such Cases, the Judges here in this Court are to do, and what Warrant is there for a Defendant to take any advantage of a bad return, made by the Sheriff 33. H. 6. Rot. 39. in the old Book of Entries, and before remembred, is a notable case, where the Sheriff at the first returns, that

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33. H. 6. Rot. 39. old Book of Entrees.

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the Plaintif had not found Pledges, what then shall be done with the Writ, in whom shall the fault be, it is there said to be in the Plaintif, and what shall then be done, there it appeares, if no pledges were found, this is the default of the Partie, but where it is, *quod Vicecomes, non misit breve*, there it is the default of the Sherif here the Defendant was ready, and appeared, and for that, the Plaintif would not declare against him, his appeale was abated, the Sherif returnes, that no Pledges were put in, this shall not destroy the Writ, but to have an *Alias*, and a *Capias*, and to this purpose are the Cases before remembred of 11. H. 4. fo. 82. Fitz. tit. Return el vic. pla. 53. and 18. Eliz. Dyer pla. 348, 349. but there it appears, that appearance of the party, doth not make all returns of the Sherif to be good, for the Law gives advantage to the party, for to except against them, his appearance is, that he may have advantage by the same, and not to be by this concluded, to make all good that is done, for that this should be *oppositum, in objectio*. As to the return here in this principall Case, whether the same be good, or erroneous, is the question, in which it is to be examined, what return this is, which is here made, and by whom the new Sherif here returns nothing, that was done by himself, but what was done by the old Sherif, the new Sherif ought to make the return, and this return is good, he ought to return some thing, and he ought to return that which was done by the old Sherif, and no more, and so he hath done here, all which he ought for to doe. In the next place, it is to be examined, in whose custody the body taken now is, whether he be in the custody of the old Sherif, or of the new Sherif, the Proces shall go to the Old Sherif, who took the body, and a Distringas, to have the body in Court, and to this purpose he shall be said to be an Officer to this Court, for the old Sherif is here chargeable with the body, by him taken. It hath been said, that the old Sherif, hath now no Authority at all in him after a new Sherif chosen: as to this it may be Answered, that the old Sherif may deliver up the body unto the new Sherif, and he may bring in the body by him taken, in his custody, and untill he have delivered all up unto the new Sherif, which he had in his custody, and untill this be all done by him, he continues still an Officer to the Court, and is responsible for them, so that here the return is good, and this shall be the return of the old Sheriff of that which he had done, and no escape can be, by this (as it hath been alledged) for if this should be an escape, (as hath been objected) then no Distringas should issue to the old Sherif, for to have the body in Court, and in this the Law is very cleere, that a Distringas shall go to the old Sherif, and so he continues an Officer to the Court, and against whom the Proces of the Court shall be awarded, as against an Officer of the Court. As to the Return, as the same now is in Court, whether the same be good or not, is in the next place to be considered. As to this, the Return as it here is, is no return at all, being only a return of that which was executed before the old Sherif here returns *non est inventus*, having delivered the body over to the new Sherif, who returns nothing for himself, as done by him, but this only, which the old Sherif had done, and this is is not good, but he ought also to make some return for himself, but here it is not so. As to presidents in this Case, there are very many, but none in Cases of Appeals, but many Presidents there are in cases of Indictments, directly in point, as this Return here is: but nothing is here more to be done, we may well award a Distringas to the Old Sherif, for to have the body here in Court, for the new Sherif cleerely is not as yet chargeable with the body, as appears by the case in Tr. 22. E. 4. Fitz. tit. Return of the Sherif pla. 33. where the old Sherif will not deliver the Writ to the new Sherif, it is matter of policy in the new Sherif not to take it. All this matter is here brought before us by this Demurrer, to be considered of. The next matter here to be considered of, is the Declaration in this Appeal, whether the same be good or not. As to this, the Declaration here in this Appeale, is faulty, insufficient, and incertain, and that in many particulars, which shall be shewed. If any faults be in the Declaration, it is to be taken for a

11. H. 4. fo. 82 Fitz. tit. Return el vic. pla. 53. 18. Eliz. Dyer pla. 348. & 349.

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rule,

By the Statute of Glouceſter 6. E. 1. cap. 9. theſe 8. Certainties to be expreſſed in the Declaration upon the Appeale. 1.

rule, that we cannot then proceed to a Triall by the Statute of Glouceſter, cap. 9. No Appeale ſhall be abated, if the Appealor declare in certain, Firſt, the deed: Secondly, in what part of the body: Thirdly, the year: Fourthly, the day: Fifthly, the hour: Sixthly, the time of the King: Seventhly, the Ville, or Town where the Deed was done: And Eighthly, with what weapon he was ſlain, all theſe ought to be certainly expreſſed in the Declaration, or the Declaration is not good. Firſt, as to the Fact, this ought to be expreſſed, to be of malice prepenſed, and aſſault: As to this, it is here ſaid, that Edward Morgan in the years, &c. the 8. and 34.—*Circa horam & percuſſit, & pupugit*, and doth not ſay—Anglice as he ought to do. See Coke 4. pa. fo. 40. Yonges caſe *percuſſit & perforavit*, theſe are *Synonyma, unam plagam mortalem*, this is ſufficient, without ſaying any more, for that an Anglice is not to be uſed, (*ad plagam*) as to ſay Anglice, a deadly thruſt, and wound, as appears Coke 5. pa. fo. 121, 122. in Longs caſe, and there it is reſolved, that *Vulnus* and *Plaga*, are *Synonyma*, *& idem ſignificant*, and both wayes good, and that *plaga* is the moſt uſuall word in Indictments. In the next place, as to the year, the 8. year of England, &c. Objection made, becauſe it is not ſhewed, whether it were the 8. year of the Kings Reigne of England, or of Scotland, it being not ſhewed which, it may be anſwered, that this ſhall be intended to be of England: as to this it ſhall not be ſo intended, in caſes of Appeals, no intendments to be in ſuch Caſes, but all is to be ſet down and ſpecified in certaine, this is not to be much ſtood or relyed upon, but that which by the Statute ought to be certainly expreſſed is here leaſt, altogether uncertaine the day here, is well expreſſed *predicto die*. Fourthly, the houre is not certainly expreſſed, and in this I cannot be ſatisfied as to the hour—it is here layd to be, *Circa horam undecimam ante meridiem ejuſdem diei*, what houre this ſhall be, I deſire to be ſatisfied herein, the fact ought to be done within the compaſſe of an houre *eodem die, loco, anno, comitat. poſtea* (s.) *circa horam predictam*, what houre is this, the fact ought to be laid, to be within the compaſſe of an houre, and where it is here laid to be *circa horam undecimam*, what houre this ſhall be laid to be, is altogether uncertain, for this ſhall be ſaid to be part of the 11. hour, and part of the hour after this, *Circum, circa*, is not good, if he had ſaid *ante horam undecimam*, there no *circa*, but when there are 2. *circas*, the one of neceſſitie ought to be longer then the other, if he had here ſaid *circa horam undecimam predictam*, this might have been good, but here it is without any prædict. and therefore it is to be taken for another hour, no preſidents there are to have 2. *circas*, in one Judgemen, as here in this Caſe, for this is as a Circle about a Circle: 2. *circas* here not good, the ſame ought for to have been *hora predicta*, and not with a *Circa*, next as to the place *in comitat. predict.* it appears in Stamford, that when it is ſaid, *Locus prædictus*, the ſame ſhall not be taken for more then one, and ſo to be the ſame County *prædict.* there being but one before, here he hath named Middleſex—as to the addition of London—in 21. E. 4. fo. 24. 6. In an Appeale of murder brought by a woman for the death of her Husband at the fourth day, *de quindena Paſche* the woman, the appellant was demanded, but appeared not, whereupon it was prayed, that ſhe might be Nonſuited. Fairefax there anſwered, that our Office is to be ſlow in Judgement, and not haſtily, for if ſhe come not in, this fourth day after, we will then give Judgment, for it may bee hat ſhe is arreſted, or raviſhed, in coming to the Court, and we will be well adviſed, for if we ſhould give Judgement now, the Appeale is gone for ever: Two Towns are here named—(s.) Fubbervill, and Turbervill, and Morgan is named of another Town, in the addition here it is laid to be, *in Loco predicto*, without naming of the place. Trinit. 30. Eliz. Morgans caſe, where two Towns were named as before, and he was named of another in the addition, but nothing was there ſaid to it, by way of exception, and ſo he was condemned, and executed, and afterwards a Writ of Error was brought by the Heire, and the Judgement was reverſed, for this Error only being, becauſe it was laid to be *in loco predicto*, without naming of the ſame place ſpecially, be it here

Coke 4. pa. fo. 40. in Yongs caſe.

Coke 5. pa. fo. 121, 122. in Longs caſe. 2.

3.

4.

5. Stamford.

21. E. 4. fo. 24. 6.

Trinit. 30. El. Morgans caſe.

here a County, in this Case it is not laid to be *in comitat. predict.* it ought to have been here *in Loco predict.* and to have named the same in certain, here it is laid to be, *tunc, & ibidem*, this in *incertum per incertius*, here, as to the weapon, that is well laid. As to the fact, *percussit, & pupugit, dans mortalem plagam Anglice*, this ought not to be so, with an Anglice. As to the houre, this is not well laid, being with a *circa* which is uncertain, and doth exclude the former, and so upon the whole matter, the Declaration, in this Appeale, is altogether uncertain, and so for this incertainty in the Declaration, the Appeale ought to be abated, and the partie discharged from this Appeale, and this he declared for to be his unalterable opinion. Williams Justice, As to the Declaration in this Appeale, we have delivered no opinion, as touching this, for that no exception was taken to the the same, neither at the Barre, nor yet by any at the Bench, but only by Flemming chief Justice. It must be agreed, and cannot be denyed, that if the DECLARATION be vitious, the Writ of Appeale ought then to be quashed, and made void. The Court gave commande to the Counsell at the Barre, for to attend them with Presidents to these last exceptions taken by Flemming to the Declaration. At another day, Yelverton at the Barre did move the Court *quod breve cassetur*, upon this day was given by the Court, to shew presidents in this Case: and by the Rule of the Court, no Argument to be made at the Barre in this case, to these last exceptions taken: after that the Court have argued, and delivered their severall opinions in this Case. Williams Justice, this may well be argued again at the Barre, when new matter was moved at the Bench, not spoken of before, the whole Court against him in this, and so was it held by all all the Judges, in the Argument of Rutland, and Shrewsburies case here resolved, and that upon divers reasons, and matters, moved at the Bench, which were never moved at the Barre. As to Presidents, Holecrafts Case was shewed to the Court in an Appeale, where the same was laid to be *Circa horam*, and one Davis case, where it was laid to be *Circa horam undecimam, die, anno, loco, ac circa horam predictam.* Davis, & James Howell John, these two last appeales were discontinued. Croke Justice, as to the Declaration, in this place, excepted against, the Declaration is good, and sufficient certainty in it, and so likewise of the County, and Town, this is good, and certain without any ambiguity, as to Holecrafts case, that comes not to this Case here in question, here the place is named 8. times severally in this Appeale. Flemming chiefe Justice, you are not to deliver the reasons of your opinion, this is not the course, nor ever was it so, and no president can be shewed for to warrant this, you are only for to deliver your opinions, and to declare the same, whether you do agree, or disagree, without giving the reasons of your opinions, and according to this, is the president in Grendons case in the Commentaries fo. 502. where Dyer chief Justice who argued last, took four exceptions not moved before, to which exceptions the Counsell there delivered their Answer in writing unto Dyer the chief Justice, but did not argue this, and the other Judges did see the Answer, but did not give any reasons of their opinions, unto these Exceptions taken by Dyer, no more ought you to do here in this Case, but only to deliver your opinions, whether you do assent, or differ in opinion, without opening of your Reasons, one way, or another, but you are to keep your reasons to your selves, and so it is, and in all times before, it hath been the course, and order, and this ought now, and at all times to be so kept and observed. Williams and Croke Justices—against him very strongly in this particular. Yelverton Justice agreed herein with Flemming chief Iustice, Williams and Croke Iustices, desire for to deliver their opinions, and the Reasons of their Opinions unto the DECLARATION, and to the exceptions, taken to the same, but Flemming chief Justice, Fenner and Yelverton Iustices would not to this agree, to have them to deliver their Reasons openly, but if they will so do, and that in private amongst themselves, within 2. or 3. dayes, to this they would agree, otherwise the Appeale to be abated. Afterwards, at another day, Croke Iustice openly in Court delivered his opinion, and the Reasons thereof unto the Declaration, and to the exceptions taken to the same, if there ap-

6. 7. &

Plowdens Comment fol. 502.

peares to be any incertainty in the Declaration, either in the time, or place, which ought to be certainly expreſſed, this ſhall abate the Appeale, but here in this caſe there is no ſuch incertaintie in the Declaration, either in the expreſſing of the place,
1. or the time here, in this caſe Horneſey is 8. times named before the *predict.* ſo that here is ſufficient certaintie, the Stroke is laid here to be apud Horneſey, where it is expreſſed, *unam plagam*, no Countie named, as it is objected, as to this, it is here twice expreſſed for to be in Comitatu Middleſex. and ſo there is no manner of doubt, or difficultie in this Caſe, but that the Declaration is good, and certaine enough. As to the exception taken to the Declaration, to the point
2. of time, that the ſame is not certainly expreſſed therein, being laid to be *circa horam undecimam*, as to this, there is no incertainty in point of time, as it is here laid, wherein the difference will be, if it had been here, with a *circa* upon a *circa*, this had been bad, and altogether uncertain, and would have abated the Appeale here, *circa* is named ſeverall times in this Declaration, Firſt, *Circa horam undecimam.* Secondly, *Circa horam*, if the houre be certainly expreſſed before, if afterwards it is expreſſed again with a *circa*, this ſhall then be ſaid to be a *circum circa*, and ſo bad, for incertaintie: but here in this caſe, there is no ſuch certaintie of the houre before, and therefore to ſay here, *circa horam undecimam* is good, and no incer-
3. taintie at all in this Allegation: as to the next exception, *Unam plagam mortalem*—Anglice, if thoſe be words unperfect, and not proper in an Indictment, whether the Anglice ſhall aid this, the Judges here are to make the Expoſition, and ſo here in this Declaration, there is ſufficient certainty, in all reſpects, and ſo the Declaration is certaine, and good, and the appeale not to be abated. Williams Juſtice, Judges are to make Anſwer unto New exceptions taken, which were not moved, nor ſtirred before, and this they may well do, after that they have argued the Caſe. As to the Declaration, here in the firſt Writ is named, *die, anno, & loco, & in Comitat. Middleſex. predict.* the matter here conſiderable is this, whether in this Declaration, there be any incertainty, in the expreſſion of the year, time, or place, that the Declaration is good, and ſufficiently certain, in all the Points excepted againſt, but if there were any incertainty in the Declaration, in any of theſe particulars, the ſame ſhould then be bad, and the Appeale abated, and that in *favorem vitæ*, becauſe the ſame concerns the life of a man, which the Law much favours, the Statute of Glouceſter 6. E. 1. cap. 9. as touching certainty, to be expreſſed in Appeals, the ſame is altogether in the Affirmative, but not in the Negative, as appears by Stamforde and Bracton, Stamford lib. 2. cap. 20. touching the Court, or Declaration in Appell. fo. 80. (a) cites *Bracton titulo de exceptionibus ad appella*, where he ſaith, that the Appellant ſhall not be conſtrained, for to expreſſe the houre, for he ſaith, *quod hora non eſt multum de ſubſtantia negotij, licet in appella de ea, aliquando fiat mentio*, there it is held by Stamforde, that when the hour is expreſſed in the Declaration, the ſame is then made a very materiall thing, but Stamforde there agrees with Bracton, that the Plaintif of neceſſitie, ſhall not be compelled, to mention the houre in his Declaration: by the Common LAW, and which kinde of DECLARATION by the Common Law, a man may uſe now at this day, notwithſtanding the Statute of Glouceſter cap. 9. for that the Statute doth not prohibit this, the ſame being only in affirmance of the Common Law, here in this Principall caſe, there is ſufficient certaintie expreſſed in the houre, *circa* being Engliſhed is, about, neere, to, or by, all this is the proper conſtruction of *circa*, and if it be ſo, in what way, or manner could the time be more certainly expreſſed, this could not be better nor more certainly expreſſed, then here in this Caſe it is, for that a man cannot by any way deſcribe more certainly, a thing to be done *puncto temporis*. In the old Book of Entr. fo. 47, 48, 49, 50. En. tit. Ap. de mort. ſeveral preſidents in this manner, as there pla. 2. *circa horam ſecundam poſt meridiem ejuſdem diei*, and pla. 3. *circa horam nonam*

and

Stat. of. Glouceſter 6. E. 1. cap. 9.

Stamford lib. 2. cap. 20. as to the Court or Declaration in appeale fo. 80. a. Bracton.

Stat. of Glou. cap. 9. a. ſtat. in affirmance of the common law.

and pla. 4. *circa horam ſeptimam*, and pla. 5. *circa horam quartam poſt meridiem ejuſdemdiei*, and divers other preſidents there be there in like manner pla. 6. pla. 10. pla. 15. and ſo in the old Book of Entries, en title. Enditement fo. 263. pla. 4. the like preſident *circa horam primam poſt merediem ejuſdem diei*, and Coke 4. pars fo. 41. in Heydons caſe, indicted for the death of Savage, where the preſident is, that *circa horam decimam ante merediem ejuſdem diei*, and no exception at all taken unto it, and ſo the like preſidents are in the old Book of Entries fo. 43. in tit. Appeale pla. 1. where the Court in an Appeale de mort, was by the Wife for the death of her Husband, where the time is laid to be *Circa horam ſecundam poſt meridiem ejuſdem diei*, and there fo. 45. tit. Appeale de maxime pla. 3. where the time in the Court is laid to be *Circa horam primam, &c.* All theſe are preſidents in point, and the time laid, in ſuch a manner, as it is here in our Caſe (s.) *circa horam*, and no exception at all taken thereat, and therefore this is good, and certain enough, notwithſtanding this exception taken, and theſe former preſidents were in caſes of Appeales, and the time expreſſed with a *Circa horam*, and no exception taken for the ſame, and there cannot be more certainly expreſſed, as in *puncto temporis*, and ſo the Declaration is good and certain, in this Particular point of time here, and it is alſo here *die, anno, & loco*, this is good, and certaine.— *Nuper de London*, this is a good addition, if any thing be defective herein, the ſame may be amended, as appears by the Booke of 21. Edward 4. fo. 37. and 44. Edward 3. fo. 6. b where the Rolle was amended in another Terme, and this to be ſo done (is there put (with a *mirum*) but there is no need of any ſuch matter here, for here is no uncertaintie at all, in the expreſſion of the place, here the fact is laid to be in this manner—*malitia præcogitata, & unam plagam mortalem*—without *malitia*, but here lay a couple altogether, and it is good. *Loco*—here refers unto Nidſex—In Nottingham—in ſuch a Town *die, anno loco, in Comitat. Nott.* this ſhall include the place, named Eſſex, and Hartford, *anno die & loco, in Comitat. Eſſex*, this includes the Place named—*unam plagam mortalem*, a deadly thruſt, this may be a wounde, or a ſtroke, *vulnus, & plaga ſunt Synonyma*, and the Engliſhing, will ayd, and amend this—*percuſſit, & pupguit unum, & idem ſignificant*, and this appears to be ſo, Coke 5. pa. fo. 121, 122. in Longs caſe there, *percuſſit, & perforavit*, all one, and ſo upon the whole matter, notwithſtanding any of the Exceptions taken, the Declaration is certain and good, and ſo the partie to proceed in the Appeale. Flemming chief Juſtice, my words, opinion, and judgement in this caſe have been, now arraigned, and anſwers endeavoured to be given unto the Exceptions by me taken to the incertainty of this Declaration, and upon all that, which hath been ſaid, by way of Anſwer, I am no wayes by this altered, but the more thereby confirmed in my Opinion, which before I have delivered, and to fortifie this by Preſidents in Caſes of Appeales, and for this, ſee the preſidents of Trinit. 39. Eliz. Rott. 872. B. R. Eſſex, and Hartford, and Hill. 42. Eliz. B. R. Rot. 577. and Trinit. 40. Eliz. B. R. Rot. 243. Hill. 42. Eliz. there one Blackwell did appeale, John Jones, and others, and other Preſidents there are to this purpoſe. Williams Iuſtice, the Declaration here ſhall be good without mentioning of any houre in the ſame, and ſo is Stanford fo. 80. in point, as before is cited.——

Flemming chiefe Iuſtice to the contrary, that the hour ought for to be as certainly expreſſed in the Declaration, as any other matter whatſoever, but this it ſeems doth not ſatisfie others, neither do the Reaſons of others ſatisfie us, and therefore the Rule of the Court was, that for the incertaintie in the Declaration: Judgement ſhould be entred, that the Appeale for this cauſe ſhould be abated. Note there were three Judges againſt two for this, and ſo this Rule of the Court was entred accordingly—*quod nota*—*Nota* alſo, that this was an angry Caſe, and did very much

Preſidents in the old Book of entries fo. 47, 48, 49, 50. tit. appeale de mort. pla. 2, 3, 4, 5, 6, 10, 15. and fo. 263. tit. Enditement pla. 4.

Croke 4. pa. fo. 41. in Heydons caſe indicted for the death of Savage, there it is Circa horam old Book of Entries fo. 43. tit. Appeale pla 1. & fo. 45. pla. 3.

Circa horam.

21 E. 4. fo. 37.
44. E. 3. fo. 6. b

Preſidents in point of Appeales.
Trin: 39: Eliz: B: R: Rot: 872: Eſſex and Hartford.
Hill: 42. Eliz: B: R: Rot: 577: Blackwell, and Jones: Trin. 40: Eliz: B: R Rott: 243: Stanford fo. 80.

much trouble the Court, as appears by their ſeverall Arguments before.

Judgement entred that the Appeale ſhould abate for incertaintie in the Declaration, 3. againſt 2. Robinſon the Acceſſory appears in Court

NOte, that afterwards, Robinſon, who was one of the ſeconds, and did fly for the ſame, now appeared in Court, the Sheriff having returned for him, Non eſt inventus, he now appeared voluntarily, and moved the Court for to have this his appearance to be recorded—Williams Juſtice—if the Appeale be abated againſt the Principall, the ſame ſhall be alſo abated, as againſt the Acceſſory, as appears by all the Books. In an Appeale, all are Principalls, here is no matter now in Court againſt him. —Yelverton Iuſtice——his appearance may here well be taken, and recorded with a *ceſſat——ulterius proceſſus* againſt him, and ſo was the Rule of the Court, he may now appeare, for feare of impriſonment—and for that the Writ of Appeale was now abated, he comes not in now, by a *reddidit Se*, but his appearance here is a voluntarie appearance of himſelf, and out of his own free will, upon a Return made by the Sheriff of a *Non eſt inventus*. Note that Man, Secundary in this caſe, upon the appearance of Robinſon, demanded of Yelverton, and of the other Counſell at the Barre, who were againſt the Appeale, whether they would not have the Plaintiffe called, before that his appearance was entred, and they anſwered, that as this Caſe was, they would not have the Plaintiffe called, and therefore by the Rule of the Court, his appearance was entred of Record without calling of the Plaintif unto it, *quod nota*, the reaſon of this, was conceived to be, becauſe the Writ of appeal was by the Judgement of the Court abated, and the Entrie was alſo by the like Rule of the Court, *quod ceſſat ulterius proceſſus* againſt him, *quod nota*.

The King againſt Morgan upon an Inditement of murder, Sir John Egerton the Proſecutor.

Trin. 8. Jac. B.R.

NOta, that before this time, (s.) Termin. Trin. 8. Iac. Sir Iohn Egerton, for the King, did proſecute an Inditement of Murder againſt Edward Morgan of the Inner Temple, Gentleman, for the murdering of his Sonne, by him killed, and for his Tryall at the—Barre, a Jury of Middleſex did appear, and fourteen of them being called, appeared, and anſwered to their names, but Sir Iohn Egerton the Proſecutor had ſome doubt, of favour in ſome of them, by ſome ſecret labouring of them to appear on the behalf of Morgan the Priſoner, and therefore---Davenporte being of Counſell, for the King did challenge ſome of the Jury, and ſaid unto the Court, that if they would agree to draw out two of the Jurors, which were returned to ſerve upon this enqueſt, the other ſhould then be ſworn for to try the Priſoner---The Court made him this Anſwer, we cannot cauſe any of thoſe which are returned to be drawn out, and ſet aſide, but you ought to make your challenge to them, as they are called, and then when the others are ſworn, which you did not challenge, you are then to ſhew ſufficient cauſe for to maintain your challenge, for that the King, or any for him, cannot challenge without good cauſe, but the partie himſelf, the priſoner, *in favorem vitæ*, may peremptorily challenge thirty foure without any cauſe ſhewing, and as many more as he will with cauſe, ſhewing the ſame preſently, ſee for this 3. H. 7. fo. 2. & fo. 12. 9. H. 5. fo. 7. Then the Counſell at the Barre for the King, moved the Court, that they might be ſuffered, to ſhew the cauſe of their challenge, particularly as they did take the challenge, unto this the Court made anſwer, and ſaid, that if they had cauſe to challenge any, they might challenge them, as they were called, but they ought not to ſhew the cauſe of their challenge, before that the other Jurors, which were not challenged, were ſworn, and then, and not before you are to ſhew the cauſe of your challenge, and if the cauſe be ſufficient, then the party challenged ſhall be drawn out of the Pannell---afterwards, Morgan the priſoner at the Barre, demanded of the Court, whether Davenport ſhould challenge any of the Jury for the King, he being not of the Kings Counſell, nor any of the Kings Counſell there preſent to inform againſt him, and to challenge for the King: the Court made him anſwer, that any one may be received, to challenge for the

3. H. 7. fo. 2. & fo. 12. 9. H. 5. fo. 7.

King

King, if he thinks, that any of the Jury be not indifferent, and after the Counsell for the King did challenge all the Jurors, and being in doubt, of the indifferency of the Jury, and of the sufficiency of their challenge, they doubted, that this Jury was returned on purpose, and by great labouring in the return of them, for to make them favourable, and so for these, and other causes, not named, they left off their proceeding upon the Inditement (for the present) and put in an Appeale prosecuted by the second Sonne of Sir Iohn Egerton (as before appears) the Writ returnable---*Octabis Michaelis proximo sequenti*, and so they made an end for this time. Then the Court said unto Morgan the prisoner, that he may now have Counsell assigned unto him, and therefore he desired the Court to assign him for his counsell, the Kings Atturney Generall, the Court answered, that they could not assign the Kings Counsell, to be for him, but if they would they might be either for him, or against him. The Court upon this request, assigned him for his Counsell, Serjeant Nicholls, Hen. Yelverton, George Croke, & Thomas Crew, in this Appeale, afterwards Morgan prayed the Court that he might be bayled, the Court made answer unto him, that they would be advised further of this, and so caused Presidents to be searched in such a Case, and if there be any such former Presidents to be found, then he should be bayled—Waterhouse Clerke of the Crown, and Officer of the Court, informed the Court, that they had made search for Presidents, and that they had found some Presidents directly in point, that in such a case the Prisoner might be bailed, The Court answered, that they would see and peruse the same Presidents, for now the prisoner stands arraigned, and indited of murder, and the Enditement is not gone, (by the bringing in of this Appeale) It was then demanded of the Court, whether he should here his bayle taken before he be arraigned upon the Appeale. The Court, as to this, said, they would be advised. At another time, the Court was moved again for the bayling of Morgan, and that upon the Presidents shewed, being amongst the Records of the Kings Bench, that the Judges may bayle one, being endicted of Murder.---Williams Iustice---if the default of the tryall had proceeded from a cause, on the part of Morgan the Prisoner, peradventure there he should not be bayleable, but here in this Case, because the default proceeded from the part of the Prosecutor himself, and therefore in this case, he may well be bailed.---Flemming chiefe Iustice, & Fenner Iustice agreed with Williams herein, that as this case here is, he may well be bailed---Croke Iustice, it hath been alledged by the Prosecutor, that there was great labouring of the Jury, in this Case, but no proof made of it, if this had been so proved, peradventure then, he would not have been bayleable, but here being no proof made of this, he is here well baylable. And as to the bailing of him, a President was shewed, where a man was indicted for high Treason, and was bailed. Another was endicted for murder, and had three severall endictments against him, and this was for the killing of the Constable of the King, and he was bailed. And so here, by the Opinion of the whole Court, Morgan the Prisoner is here well bailable: and the Court did all agree to bail him, and did therefore command the Officer at a day prefixed, to bring Morgan again, with four sufficient Sureties, and then he should be bailed, and that the Defendant in the Appeale is baileable, as appears by the Book of 13. E. 4. fo. 8. afterwards on another day Morgan appeared with his Baile, who were these (8.) Sir Thomas Munson, Sir Roger Dalyson of Lincolnshire, Sir John Digby of Bedfordshire, and Edward Morgan the Father of Prisoner, the Baile were bound in severall Recognisances of five hundred pound each of them for the appearance of Edward Morgan the Defendant in the Appeale at the time limited, and Morgan himself in one thousand l. bond to answer unto Rowland Egerton Plaintiffe, in the Appeale, and so he was committed again to the Marshall, and the Bailies by some command would have arrested him, going from the Barre, upon the Appeale, and they did arrest him in the Hall, the Court sent for the Sherif, and told him, that herein he had much misbehaved himself, in doing of this in the face of the Court. Flemming

Presidents shew for the bayling of prisoners endited for murder upon the putting in of an Appeale.

13. E. 4. fo. 8.

Morgans bail.

Contempt of the under-Sherif, and baily in the arresting of Morgan in the face of the Court punished.

Vide Coke li. Entries fo. 56. 57. The Record of this Appeale at large with the number Rolle entred Mich. 8. Jac. B. R. Rot. 227.

ming chiefe Iuſtice ſaid unto the Sherif, that Morgan came not to the Court by his meanes, but in the cuſtody of the Marſhall, and ſo he was the Kings Priſoner, and it is the privilege of the Court, to ſee ſuch ſafely to come hither, and ſafely to return back again, and ſaid further to him, that he could not areſt him upon that Proces, the Court demanded of Morgan, whether he would now yeeld his body, as areſted upon the Appeale, he anſwered, that he would, and upon this, by directions of the Court, a Record was cauſed to be drawn, and entred of this, (s.) that the under Sherif having areſted him by his Proces in the Appeale, that he had rendred his body, & a Warrant was made for his appearance, and the under Sheriff, and the Baily, for ſtriking, and areſting of him, to anſwer for this their contempt by them ſo done in the face of the Court, and ſo Morgan the Priſoner, and Defendant in the Appeale, was ſet at large.

Morgan ſet at large.

Appeale abated.

Note, That the Appeale being abated, by the Judgement of the Court as before appears, afterwards the Proſecutor for the King did proceed againſt Morgan upon the enditement of murder for killing of Egerton, and upon this enditement, Morgan having pleaded to it, Termin. Paſch. 9. Iac. B. R. came to the Barre, and the Jury appearing, he was tried upon the ſame Enditement, and all Challenges being releaſed, the Jury were charged for to enquire of the Fact, and upon the Evidence, the matter was at large debated, and upon the Evidence, the queſtion was, whether the Fact, as it appeared to be, was murder, or manſlaughter—Croke Iuſtice—*Convitium convitio tegere, eſt Lutum Luto porrigere*, there are three kinds of manſlaughter. Firſt, by ſudden adventure. Secondly, by miſadventure. And thirdly, where it is in his own defence, he ſaid unto Morgan the Priſoner, that for to ſend, or to accept of a challenge—if he had hapned to have killed you, it had been clecrely wilfull murder in him, but now you have killed him, you are therefore in the ſame degree alſo of wilfull murder. If a challenge had been ſent, and then inſtantly, upon hot blood, they had met, and fought, and one of them kills the other, this had been but manſlaughter, but if after a challenge ſent, they do once ſleep upon it, and ſo the challenge is accepted of, and afterwards they fight, and one of them kills the other, this is murder in him cleerely, for that this is done, *ſedato animo, & intervallo temporis*, and ſo it is murder, here in this caſe, and therefore you are now to goe from the ſeat of Juſtice, and to addreſſe your ſelf unto the ſeat of mercy.—Williams Iuſtice.—If it were not for example ſake, I would mingle Circumſtances, obſervable in this Caſe, as to the Challenge here, this was ſent, and received, and hath paſſed upon it here at nine of the clock, the Challenge was ſent, and the Weapons and they mett the next morning, and then they fight, and the one of them kills the other, what is the judgement of the Law in this Caſe, whether this be murder, or manſlaughter. If two men fall out ſuddenly, they offer to fight, and are parted, they preſently meet again in another place, and fight, and the one of them kils the other, this is not murder, but manſlaughter, becauſe this is done upon hot bloud, but in this Caſe here now in queſtion, this is cleerely murder, and this ſhall be as a preſident: for better it is, that you fall to the mercy of the King, then that Juſtice ſhould be perverted. If there be two, or three, or ſix dayes after the challenge before they meet, and fight, and then one of them kills the other, this is murder cleerely.—Yelverton Iuſtice.—As this Caſe is, the Law is cleere, that this is murder, and it is no excuſe for him to ſay, that he bore no malice to him before: for if one ſtab another, this ſhall be murder, for the Law in ſuch caſes, doth preſume malice to be in him, otherwiſe this would not have ſo happened, and this the Law calls malice apparant, and though the ſame cannot be proved, it is not materiall, a man cannot kill another in his own defence, which is manſlaughter, but he ſhall for this forfeit all his goods, and to have the benefit of his clergy allowed to him, and if he cannot reade, then to be hanged: but in caſe of murder, he is not to have his Book allowed to him: but in this caſe, he is to appeale to mercy. If a challenge be ſent, and received, and paſſed

Termin. Paſc. 9. Jac. B. R.

Three kinds of manſlaughter.

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led upon, and they fight, if death ensue, this is cleerely murder on both sides: but if a challenge be sent, and accepted of, and they doe presently agree to go into the field, & fight, and one of them kills the other, this is but manslaughter; but in this case now here in question, this Fact, as it appears to be upon the evidence, is cleerely murder, and this is a Case which hath been adjudged: Sir Thomas Lucas his case, where a challenge was sent, and accepted overnight, and they did fight the next day, and the one killed the other, this was adjudged to be murder, and he was hanged for it.—Fenner Iustice agreed in opinion with them, that the Fact of killing here in this Case is cleerely murder.—Fleming chief Iustice, as to the matter now in question, there can be no murder without malice, and malice may be proved divers wayes, as touching the matters precedent these are either publike, or secret, upon these the Law passeth no judgement, but in some cases the Law will adjudge this to be maliciously done, though that no proof can be made of the malice, as where a publike officer is killed by another in execution of his Office, this is murder, for the Law doth here adjudge this to be maliciously done, and in this Fact, there is malice implyed, and so it is, if that two have a purpose, and intention for to fight, and they accordingly fight, and the one kills the other, this is murder, for here the Law intends malice. In this Case now in question, cleerely here appears to be sufficient malice, to make this Fact here, to be murder, this abuse by reason of challenges, is now grown to be too frequent, and nothing can be more perilous, and destructive, then to suffer this in a civill Government, without being severely punished, and this is so frequently and advisedly undertaken, and that *animo deliberato*, that the greater care ought to be had of this, by way of prevention, stabbing, which is made murder by Statute, this was murder at the Common Law, before the Statute of 1. Iac. cap. 8. by the Statute of 1. E. 6. cap. 12. poysoning made murder, and all wilfull killing shall be taken as wilfull Murder, and so of malice prepensed, Stabbing was wilfull murder at the Common Law, for that in this is included, by apparant inference, malice prepensed, to precede the Fact, & that this was the cause of the stabbing, and of this opinion was Popham chief Iustice of the Kings Bench, in his time, that such stabbing was murder at the Common Law, before the Statute made for the same, as before, the which Statute *est Lex declarativa, & non introductiva*. In the Principall Case here, there was malice apparant, and divers degrees of malice, this acceptance of the challenge makes this murder cleerely, when he accepts of the challenge, and agrees to fight with him: and in this case here, the Fact, as by the Evidence it appears to be, is cleerely murder without any doubt. Nota, that in this Indictment there are three wounds mentioned—The Jury went together to consider of the Evidence, and of the directions to them given by the Court, they returned, and put their Verdict in writing, in as much, as they did not at all agree in their Verdict. Their Verdict was this, (s.) we do finde the Defendant guilty of murder, (but not according to the Endictment) for it is therein mentioned, that he gave him two wounds, the first was mortall, the which was under the right arme, and mentioned in the Endictment, of which mortall wound, he only dyed, and of no other, and they doe not finde any third wound given, as is mentioned in the Enditement, and that this was done by him, *ex malitia sua præcogitata*, and so concludes, that if the Court shall adjudge this Fact, to be a killing according to the Endictment, then they do finde him guilty of murder, but not otherwise. The Court did then declare to the Jury, that this their Verdict thus given, is no Verdict at all. All the Jury did agree, that the wound under the right arm was mortall, and that of this wound he dyed, and that he was killed by Morgan: that this killing was murder, and that two wounds were by him given, one of them onely mortall, and of which he dyed, so that they finde but two wounds given, and say nothing of the third, there being three wounds laid in the Endictment, and one only to be mortall, of which he died, and this was all the finding of the Jury—Williams, & Croke Justices, that this is a good finding by the Jury, they having found the death of the party killed, and that he was killed by Morgan, who gave him two wounds, one of them under the right arme, which was

Sir Thomas Lucas his case.

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Stat. of 1. Jac. cap. 8. 1. E. 6. cap. 12.

Popham's opinion of murder in case of stabbing.

The Verdict of the Jury speciall.

was mortall, of which he died, and this was murder, this is a good verdict, and by this, they have found the Prisoner guilty of murder. Flemming chief Iustice differed from them in opinion in this, here the Jury do finde two wounds to be only given, and the first of them to be mortall, of which he dyed, and if this be a dying according to the indictment, this they leave to the Court, so that they finde this specially as before, so that the Court were divided upon this Verdict, two against one. Morgan the Prisoner at the Barre perceiving that the Court did not agree, but differed in opinion, moved the Court for to accept of Baile for him. The Court all denyed to accept of Bayle for him, and as for the Verdict thus given by the Jury of this, *Curia advisare vult*, and so the matter was adjourned untill another time; and Morgan the Prisoner was carried away from the Barre, *in Custodia*.

Morgans pardon offered to the Court, and by the Court allowed of, and he discharged, and set at liberty.

Note, that afterwards (*s.*) the last day of Trinity Terme 9. Jac. B. R. Edward Morgan was brought again to the Barre, and being demanded what he had to say for himself, why Iudgement and execution should not be awarded against him, he offered to the Court, the Kings gracious Pardon, under the Privy, and the great Seale, and he humbly desired allowance of the same by the Court, the Pardon was received, and openly read, and afterwards the same was alowed of by the Court, with some good advice by them given unto him, and so by the Rule of the Court, he was discharged, set at liberty and suffered *ad largum ire*.

## *Wolterton* and his Wife Plaintifs against *Daye* Defendant.

Wolterton and his wife Plaintifs against Dale Defendant. An action upon the Case for a promise entred Trinit. 7. Jac. B. R. 1596.

IN an Action upon the Case for a promise. The Case was this, It was agreed between the Plaintif, being a Feme sole Executrix of her former Husband, and the Defendant, in manner following, that upon the payment of 89. l. —upon such a day, then to come, by the Plaintif the Executrix unto the Defendant, and upon request made, the Defendant did assume, and promise, that he would reconvey certaine Messuages, with other Lands unto the Feme Executrix, which were before conveyed to him by her former Husband (for the securing of money, by him owing to the Defendant) she accordingly payes the money on the day and then doth request the Defendant according to his promise, to make the conveyance to her, the which to do, he refused, and upon this refusall, an Action did accrue unto her, afterwards she takes to Husband the Plaintif, so that the Action now accrues unto him, as in right of his Wife, and they having no remedie to compell the Defendant for to make the conveyance at the common Law, but only in Chancery, (none at the Common Law) but only their Action, for the not performance of his promise, in the which Action, Dammages are only to be recovered, the which damages, are only to go to the Husband, afterwards the the Plaintifs commence a Suite in Chancery, against the Defendant, to have a reconveyance made by him, to the feme Plaintiff according to his promise, upon the hearing of which cause the Court of Chancery did there Decree, that the Plaintifs should pay unto the Defendant 100. l. more upon a day certaine, then to come, and that after this payment so made, and upon request, the Defendant was Decreed to make the reconveyance according to the former agreement, and that this should be in full satisfaction, and Discharge of the former agreement. The Husband according to this, and in pursuance thereof, payes the 100. l. unto the Defendant, who according to the Decree makes a Reconveyance of the Land, by a Feoffement unto the Feme Plaintiff, Executrix of her former Husband, of which reconveyance she did accept, and afterwards the Plaintif and his Wife brought their Action upon the Case, against the Defendant upon the first promise, and for breach of the same. The Defendant in Barre

to

to this Action pleads the Decree made in Chancery and the performance of the Decree, by payment of the money Decreed to him, and the reconveyance by him made, according to the Decree. To this Plea the Plaintifs Demurred in Law, the only question, being, whether, (as this Case now is, by reason of the Decree, and performance of the same) the Action brought by the Plaintifs, doth lye or not. Richardson for the Plaintifs, that the Action is well brought, and that this Plea in Barre, is not sufficient, because there is no expresse averrement of any acceptance, or agreement to this by the Husband, for the conveyance was made to the wife, and by the acceptance of the wife, the Husband shall not be barred of his Action, in this his plea, he ought to have averred an acceptance by the husband, and an agreement, to that which was done to the wife of the Plaintif, and this he ought to have done here in this Case, where the performance is not according to the first agreement, but by another matter, as by the Decree here in the Chancery, or otherwise, there in pleading of the performance, in such manner he ought here specially to averre an acceptance by the Husband, (s.) to say, unto the which he did agree, because that this is a thing collaterall. On the other side, it was urged for the Defendant, that the Plea in Barre was good, for that by the Decree, the reconveyance upon payment of the 100. l. was to be in full satisfaction and discharge of the first promise, if one doe promise for to make a conveyance to another of certaine Land, by such a day, and seales to do it, the other hath his remedy by way of an Action upon the Case, but in this Action, he cannot recover the Land, but only dammages afterwards, if the other doth make a Feoffement to him, in satisfaction of his promise, by this his Action, for the non-performance of the Promise, is gone, and as to the acceptance of the Feoffement in this Principall case, the same needs not to be pleaded, but here it is said, that this conveyance, was to be made, to a Feme Covert, and accepted of by her, and that this shall not binde the husband, to this it may be answered, that the Husband takes by this, as well, as his Wife, and the same is, and shall be said to be in them both, untill the Husband do disagree, also the 100. l. here was paid by the Husband, in performance of the Decree, for which the Feoffement was to be made, and this to be in satisfaction, and discharge of the first agreement, and this to be by the Husband, and by his agreement, and all this is included in the manner of the persormance of this Decree, all which is fully set forth in the Plea, and this payment here of the 100. l. by the Husband to the Defendant, according to the Decree, is a full agreement by him, that the Action which accrued unto him, for the first breach of the promise should be by this performance of the DECREE, gone, and discharged, and a Feoffement, may be very well pleaded in satisfaction of a promise broken, and so was it adjudged in one Platts Case, 3. Iac. C. B and when the Feoffment pleaded, this includes and implies an acceptance, and when the Plaintif being the Husband, here payes the 100. l. to the Defendant, by this he takes notice of the Decree, and according to the Decree, and in performance thereof he payes this money, and this is, and cannot by any construction, be otherwise taken, but to be in full satisfaction, and discharge of the former promise, and of this he cannot be misconusant. Richardson for the Plaintiff said, that this was but an implied assent, and as to the payment of the 100. l. by him, he did this by compulsion, being Decreed for to pay it, and he paid this, *secundum ordinem, & decretum prædictum*, and not in discharge of the former promise, so that this was not a voluntary, but a compulsory payment by him, and as to the certainty of acceptance, this ought to be shewed by way of averrement in pleading, which is here omitted in this Plea in Barre, and so the Plea not good. To this it was answered for the Defendant, that this being a Plea, and good to a common intent, is sufficient, and shall be good to all intents, but otherwise it is of a Declaration, which ought to be more certaine. Williams Iustice —a Discharge by word of a thing in action is not good, but the same ought for to be by writing, and so it hath been adjudged. Flemming chief Justice, the plea in Barre here is good, the Husband here had good cause of action, for the former breach of promise, in the which he was only to recover dammages, (his Wife being joyned with him in the Action) but no Land could this way be recovered, afterwards they commenced their suite in the Chancery, being

3. Iac. C. B. Platts case.

willing, and desirous for to have the Land, the Cause there heard and decreed that they should have the Land, and that the same should be reconveyed according to the former agreement, but the Land being better worth, then the dammages, that might have been recovered, the Court of Chancery decreed further, that the Plaintif should pay to the Defendant 100. l. more, and this to be in discharge of the first promise, the Feoffement is here made to the Wife, and the estate setled in her, by the payment of the 100. l. by the Husband, and by his going into the Chancery, and the payment by the Husband of this 100. l. to the Defendant in performance of the Decree, is a full and a good assent unto the whole Decree, and the same shall stand in force, and this payment by the Husband, was not compulsory, but voluntary, for he might have chosen whether he would have paid the 100. l. or to have taken his Action at the Common Law for his dammages, but the Land could not be had, and dammages likewise recovered by the Husband, the Defendant here would rather have kept the Land, then have parted with it, but upon the payment of the 100. l. by the Plaintif to the Defendant, he was then compellable to perform the Decree, and to make the reconveyance which is here done by him, in performance of the Decree, and all this appears fully, and plainly by the very plea, which plea is good, and the bringing of this Action is not a disaffirmance of the Feoffement, this Decree was well made, and upon very good ground, and is good both by Law, and in conscience. Note, the Court was before of this opinion cleerely against the Plaintif, that the Plea was good, and that the Plaintiffe ought to be thereby barred of his Action, and the Rule of the Court was entred before for the Defendant, that this his Plea in barre was good, *& quod Querens nil capiat per billam*, and the Court being afterwards upon another day pressed for their direct opinions, and resolutions in this case, they all of them *una voce*, resolved, *nullo contradicente*, as before, that the Plea in barre here was good, and that the Plaintifs ought to be barred from any further proceedings in this Action, and so all the Judges agreed cleerely in this, that the former Rule by them entred should stand, the same being as before, *quod Querens nil capiat per billam*, *quod nota*.

Judgement of the Court, quod Quærens nil capiat per billam.

## *Goldney* Plaintif against *Curtise* Defendant.

Entred Hill. 7 Jac. B. R. Rot. 864.

The Case upon a Covenant for further assurance, was this, A. enfeoffes B. or sells unto him two yard Land, and covenants to make him further assurance, as the counsell of B. shall devise: afterwards B. by advice of his Counsell, tenders to him a note of a fine to be levied: First, it was questioned at whose cost this fine should be levied, in regard there was no Writ of Covenant before hanging, it was held that this ought to be at his costs, who is to have the fine leavied to him, according to the opinion of Markham Pasch. 8. E. 4. fo. 2. where he saith, that if one be bound for to leavie a fine to another, of an Acre of Land, he is not bound to sue forth the Writ of Covenant, but he who is to have advantage of the fine is to doe it. The Court in this case were cleere of opinion, that he ought for to leavie the fine upon this note, notwithstanding there was no Writ of the Covenant then hanging, for that this is the assurance, by his Counsell devised. It was also said by the Court, that fines are usually leavied without any Writ of Covenant hanging, as fines leavied before the Judges of Assise. It was also held, that when he hath bargained, and sold two yard Land, and Covenants to make further assurance, and this to be by fine, this fine shall be of all the Acres contained in the two yard Land, and this to be to the use of the bargainee and his heires, but it is not certaine, how many Acres are contained within this. *Curia*, He leavies the fine, and if there be more Acres then will make two yard land, the Covenant is well performed, and for so many Acres as shall make up the two yard Land, this shall be to the use of the Bargainee, and his Heires, and as to the Surplusage of his Acres, this shall be to the use of himselfe, and his heirs, the

Pasch. 8. E. 4. fo. 2.

Covenant

Covenant was, as before, to be performed upon request made, request was accordingly made, and signed by a note, and therein expressed in certaine the quantitie of Acres, which note contained more Acres then the two yard Land, the Court was cleere of opinion that this was good, and that this was done according to the usuall forme, *quod nota.*

## Doctor *Ayray* Plaintif against Sir *Richard Lovelas* Defendant.

Dr. Ayray & Lovelas Case, as touching a usurpation.

THe Case was this, 18. Januarii 14. E. 3. the King did grant a License to Roberto de Eglesfield, for to found *quandam Aulam Collegialem sub nomine Aulæ Scholarium Reginæ de Oxon: quæ per unum præpositum de dictis scholaribus juncta ordinationem præfati Roberti inde faciend. gubernabitur, &c.* Dr. Ayray being Provost of the said College did present a Clerke to a Church being void, by the name of the Provost of the Colledge of the Queen in Oxon. and omitted the word (Scholarium) the question was, whether this presentation thus made by a contrary name of their foundation, with admission, institution, and induction thereupon, shall be a usurpation, and so gaine the Patronage to them, they having thus done, the first, second, and third time, without any manner of disturbance. It was in this Case held cleerely by the Court, that this presentation thus made, by the contrary name of their Foundation, shall make no usurpation, nor gaine any Patronage to themselves, here in this Case, there was no such name of incorporation, as they presented by, and so consequently, no usurpation thereby by them gained, and a confirmation, upon such a presentment, shall not make it good, but the Patronate remaines, as the same was before, such presentation made. Flemming Chief Justice, the Provost here presents by such a name of incorporation, where as there is no such name, and his Clerke upon this his presentment, is by the Bishop admitted, instituted, and inducted, the question is, who shall be here said, to be the usurper: for cleerely, this presentment, in this manner, shall make a usurpation, the Partie which is so presented, shall not be this be the usurper, for that the presentment as to him, (being by a void name of incorporation) is void in it self, and he by this gaines nothing at all, the Presentation of him, being by a contrary name, differing from the name of the foundation, but this Collation here by the Bishop, shall make him to be the usurper, and this was so agreed by the whole Court, but by the rule of the Court, and by the assent of the parties, this matter was referred to Mr. Serjeant Nichols, and Mr. Henry Yelverton, finally to end and compose this matter between the Parties, and in case they should not end the same, then the same was by like assent referred unto Flemming chiefe Iustice as Umpire, to end and determine this matter between the parties.

The matter ended by agreement.

## *Brickendell* Plaintif against ——

Brickendels case, an Action upon a promise.

IN an Action upon upon the Case for a Promise, the Case was this, A. did promise unto B. that if he would deliver unto him his two fat Oxen, *infra breve tempus*, that he would then pay unto him 100. l. for the Oxen, *infra breve tempus*, the Plaintif in his Declaration sets forth, that he did *infra breve tempus* deliver the two Oxen to the Defendant, and that he had not paid him the 100. l. *infra breve tempus* upon Non assumpsit pleaded, a Verdict was given for the Plaintif. It was moved in arest of judgement, that the Declaration was not good, for the incertaintie therein, for that it is not known what time shall be said to be *breve tempus*, as if a man shall sell a Horse to another, for as much as he shall value the same, this is not good, for that his value is not known at the time. Flemming chief Iustice the DECLARATION is not good, for this incertaintie in it, this *per breve tempus* here, is no certaine time at all,

It is as if I sell a Horse for 10. l. to be paid *per breve tempus*, if he do not pay the money within as little a time as may reasonably be, he may then well sell the Horse to any other, and this second sale shall be good, and so is the Book of
14.H.8.fo.18 19.20. 14. H. 8. fo. 18. 19. 20. Wheelers case. Yelverton Iustice, fourteen dayes after he delivered one of the Oxen, as by his Declaration appears, so that by this, he himself hath assigned, and set down what time shal be said to be the *breve tempus* of his part. —Flemming chief Iustice, this is but a colourable reason. The Court all agreed that this Declaration is not good, for the incertainty in it, for *per breve tempus* here is as uncertain, what time this should be, as the Case of forbearance, *per paululum tempus* which was adjudged in the Exchequer to be no time, and so voide for incertaintie. The Case there was between Sackford Plaintif against Philips Defendant in the Court of the Exchequer, In an Action upon the Case for a promise, grounded upon a consideration of forbearance *per paululum tempus*, this is held no good consideration for the incertainty of the time, for that *paululum tempus*, is no certaine time at all, and so was it adjudged here in this Court. Termin. Pasch. 8. Jac. In an Action upon the Case for a Promise of forbearance of his demand of money, *per paululum tempus*, and after he makes his demand presently, and upon this the other brings his Action upon the Case, grounded upon the consideration of forbearance *per paululum tempus*, the Court were cleere of opinion, that the Action upon the Case here did not lye, by reason of the incertainty of time, in the words of forbearance, *per paululum tempus*, which words containe in them no certainty at all, of any time, and so by the opinion of the Court, he which made this promise, to forbeare his demand *per paululum tempus*, may make his demand when he pleaseth, and so here in this principall Case, *per breve tempus* is no certaine time at all, and so was the opinion and Rule of the Court, that this Declaration is not good, for this incertainty in the words here—of *per breve tempus*. Fenner Justice agreed in this, that there is no difference between this Case, and the Case which was here adjudged in consideration of forbearance *per paululum tempus*, this was here held void and uncertaine, for that this can receive no certaine construction in Law, for what time certain this shall be, and therefore voide. Croke Justice of the same opinion, there wil be a great difference between *tempus conveniens*, *Tempus breve*, & *paululum tempus*, and of this the Law shall adjudge: it is said that the whole life of man is called *breve tempus*, but this *breve tempus* is so uncertain in it self, as that no contract can be grounded upon it, the whole Court agreed cleerely in this, that the Declaration is not good for this incertainty, and therefore the Rule of the Court was, *quod Querens, nil capiat per billam*.

Sackford Pla. against Philips Defen. in the Court of Exchequer. Termin. Pas. 8. Jac. B. R.

Judgement of the Court, quod Quærens, nil capiat per billam.

## *Moore* Plaintif against *Brown* Defendant.

An Ejectione firme. Essex. Nisi prius Releas pleaded, puis le darreine continuance.

IN an Ejection firme for entring into certaine Lands in three severall Villes, the Declaration makes mention of no Ville in certaine, the Defendant pleads a releas puis le darreine continuance, before the Justices al Nisi prius, the Justices of Nisi prius, have no power there there to amend any fault in the Declaration, they have only power, and authoritie to take the enquest, and when the Session is ended, their authoritie then doth cease, and in this the Court agreed. Yelverton Justice, A man cannot plead a releas, al Nisi prius after issue joyned, for so none should have Judgment in 10. H. 7. fo. 21. a Nisi prius was taken at Canterbury, in an Action of Debt for rent, the Defend pleads levied by distresse, upon this they were at issue at the Nisi prius, the Defendant pleads the releas of the same pues le darreine continuance, it is there held, that when this plea is pleaded, the Justices of Nisi prius cannot proceed to take the enquest, and to this plea of the Defendant, the Plaintif cannot there reply, but he ought to reply en Banke. Fenner, Yelverton, & Croke Justices, after issue joyned, and a venire facias awarded, of such a Ville, the Sherif returns Nul tiel ville, this is not good, for he cannot return, that that thing which is contrary to the issue, and to the venire facias, to avoid the tryall a fortiori, one of

10. H. 7. fo. 21.

the

the Parties himself cannot plead such a Matter. Also it was said by the Judges, that at the Nisi prius, the Power and Authoritie of the Justices of Nisi prius is only to take the Verdict of the Jury, and no other Plea, and in all this the Court agreed.

## *Penruddock* & *Lanxfords* Case.

EXception taken by Yelverton, to quash an Indictment of murder being *quod*, *&c. percussit*, and doth not say *felonice percussit*. The Court held this to be a good exception. The Atturney Generall, urged that the Indictment was sufficient, notwithstanding this exception, for that the words *Murdravit*, doth imply felonice according to 5. E. 6. Dyer fo. 69. pla. 28. that *Murdravit* doth imply (*ex malicia præcogitata*) *ex necessitate* which is there omitted, as *furatus est* implies *felonice cepit* being omitted. The Court were cleere of opinion, that the exception was good, and the Indictment insufficient for this omission of the word (*felonice*) and the same is not supplied, by the word (*Murdravit*) and that the Case in Dyer is no Law. Flemming chief Iustice, *& tota Curia* cleere of opinion, that the word *murdravit* doth imply (*malicia præcogitata* being omitted, but the same doth not imply the word (*felonice*) being omitted, as in this Indictment here now in question, and in 18. E 4. fo. 10. 6. pla. 28. where the Indictment was *quod furatus fuit, unum equum ad valenc.* 20. *s. &c.* and it is there held by all the Judges, that he indictment was not good, for that the word (*felonice*) was omitted, and that (*furatus*) doth not comprehend *felonice*, (nor implies (*felonice*) in the principall Case, by the Rule of the Court the Indictment was quashed for want of the word (*felonice*) *quod nota.*

Exception taken to quash an Indictment of murder for want of this word felonicè 5 E. 6. Dyer fo. 69. pla. 28.

Indictment quashed by the Rule of the Court, for the want of felonice.

## *Davis Plaintif* against *Hales* Defendant.

IN case of Borough English, if one shews himself to be Heire of Lands in Borough English, that he is the sole Sonne of his Father, it was urged by Richardson at the Barre, that in his pleading to entitle himself as Heire unto this Customary Land, he ought not to say, that he is *propinquior hæres*, for by this he is alwais intended to be Heire at the Common Law, but he is to say that he is *Junior filius*, who is to inherite the Lands *secundum consuetudinem Manerii*. Williams, Yelverton, & Fenner Iustices, cleerly he ought to say that he is *propinquior hæres*, there were then shewed unto the Court, divers presidents of Court Rolls, of Court Barons, which were all of them, *propinquior hæres* generally. Williams Iustice, if the youngest Sonne in Borough English dyes, the middle Brother shall have the Land by the Custome.

How one in pleading shall shew himself to be heire to Borough English lands

## *Dowglas* & al Plaintif against *Kendall* Defendant, entred Termin. Mich. 7. Jac. B. R. Rott. 356.

IN an Action of Trespasse, The Case was this, the Defendant claimed common of Estovers, as appendant to his Messuage, and for this he claimed all the Thornes there growing, by prescription: the Plaintif by the command of (Saltingstone the Lord) did cut down part of them, the Defendant took them away, and for this taking away, was the Action brought, and whether this Action thus brought will lie, is the question. The Point here being whether the Defeneant may justifie the taking away of these Thorns, (claiming them

An Action of trespasse for taking of Thornes cut down by command of the Lord, the Defendant claiming them all by prescription.

them all, as Estovers by prescription, after the Plaintif had cut them down, by command of the Lord. It was argued for the Defendant, that as his case appears to be, by his prescription, he may take away the Thornes, being cut down, by the command of the Lord, it was urged, that by prescription or by grant, a man may have, and take profit *in alieno solo*, and to this purpose was remembred the Book case in Temps E. 1. Fitz. tit. Prescription pla. 55. where its said, that a man may have Land, and may plow, and sow the same, and may afterwards cut, and carry away the Corn, and when the Corn is cut, and carried away, another man may then have this land, as his severall, and the other cannot meddle with the Land, but only for to plow and sowe it, and then to carry away his Corn, being cut down, but his Cattell cannot feed, or depasture upon the Land: when he comes to plow, and to sowe it, and to carry away the corn, and he shall here have no other profit, but only the corn, but here in this case the Defendant prescribes for to have a speciall interest in all the Thornes growing upon the Land, and by the Book of 10. H. 7. fo. 24. & 25. appeareth, that a man may have an Interest in Trees, in anothers ground, and that either by grant, or by prescription. If a man have by speciall grant, the sole Pasturing of his Cattell in anothers ground, and that the Grantee shall not put in his Cattell, and afterwards he doth put in his Cattell, and the other takes them, and impounds them for damage fesant, it was questioned whether he might so do, in regard it was the free hold of the other, but it was ruled here *per curiam* in Kendericks case, and the distresse adjudged to be lawfully taken. H. Yelverton argued for the Plaintif, that the Action of Trespasse here is well brought, for he which hath the first possession, may well have an Action of Trespas against every one, but against him which hath the right, here the Defendant cannot justifie the carrying of them away, after they were cut down, by the commandment of the Lord of the Waste, here the Defendants claime is to have the Thornes by prescription, but this is to a speciall purpose (s.) to be spent, and burnt in his house, and this can be no otherwise, but only in the nature a common, here the prescription is to have the Thornes, and Trees growing on the waste, when the Lord, or one for him, hath cut some of them down, the Defendant cannot now take away, these which are so cut down before it appears by the Book of 6. E. 6. Dyer fo. 71. pla. 47. in Ishams case of the Parkership granted where it is held, that the Lord may well (if he so please) disparke the Park, notwithstanding the grant of the Office of Parkership, but if the Herbage of the Parke be expressly granted, then the owner cannot plow upon the soile: here in this case, if the Lord or any other by his appointment, cuts down part of the Thornes or Trees, the other by force of his prescription cannot take these away, for now, by this cutting down, the Lord hath disappointed him, that he cannot take them, being cut down, for he which hath Estovers to burn, hath by this a speciall property, this may be defeated by him which hath the generall propertie, and if the Lord, or one for him, cuts down all, the other cannot take them away, but makes himself liable to an Action upon the Case thereby. Thomas Crew for the Defendant, that the Action by the Plaintif is not well brought. If a man prescribes generally, to have common Estovers, if they are all cut down before he comes, he then comes too late to have them, but if he prescribes to have all the Trees there, otherwise it is, so that the difference will be, where he claimes all, and where but part, and to warrant this difference, Sir Thomas Palmers case Coke 5. pa. 24. 24, 25. was cited. Geo. Croke for the Plaintif urged that the Prescription as it is here pleaded, is not good, and that for two Reasons. First, when he here claimes Estovers for to spend in his house, he ought to have averred, that this was *quoddam antiquum messuagium*, as in 6. E. 6. Dyer fo. 70. pla. 40. Ishams case, he ought to say that it was *Antiquum Parcum, antiqua Civitas, vel antiquus Burgus*, for that these Estovers are not to be extended unto a new built house. Secondly, if the house be new built, then he ought to have shewed, as it is in Lutterels case Coke 4. pa. 4. 87. if he make new Chimneyes, that he spent the Estovers in the old Chimneys, and not in the new, and so likewise to ancient hedges, and not

Temps E. 1. Fitz. tit. prescription pla. 55.

Kendricks case.

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Coke 4. pa. 2.

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Judgement given per curiam for the Plaintif.

without shewing that they were reclaimed, and so by the rule of the Court Judgement was entred for the Plaintif.

Note where a man may justifie the taking, and detaining of the goods of another without being a trespasser for so doing.

Note, that if two men be at strife, and contention about a Boat, one of them puts in Coals into the Boat, he which hath the right, and is the true owner of the Boat, carries away the Boat with the Coals in it, and keeps it: the question moved unto the Court, was, whether he may justifie this without being liable to an Action of Trespasse for the same, and whether he may detaine the Coals untill they be replevied from him. Williams Iustice, Come may be distrained, dammage fesant, if one saddles my Horse, and then puts him into his own ground, I may well come & take my Horse away, and keep the Saddle, and not be lyable to any Action of Trespasse for so doing, and because he puts his Saddle upon my Horse, I may well justifie the keeping of it, till he brings his Action for to recover it: and so it is, if one load my Cart with his Corn, or my Boat with his Coals, or the like, I may very well take my Cart, and Boat away, and keep and detaine the goods without being any trespasser, for my this so doing, & I may very well justifie the detaining of these goods, untill he brings his Action of Detinue for to recover them again from me, the whole Court agreed in this cleerely, and that the partie was not bound for to unloade his Cart, or his Boat, and so the whole Court did adjudge, that in this Principall Case, the detainer of the Coals, was lawfull, and he no trespasser thereby, and that he might well detaine the Coals, untill the other brought his Replevin for to recover them, and this was the opinion to the whole Court.

Judgement per Curiam.

## *Dominus Rex*, & Sir *William Fitzwilliams* against *Ives*.

An Indictment of felony against a Purveyor upon the Stat. of 5. E. 3. cap. 2. Rastall. tit. Purveyors fo. 330. pla. 8. the case of the Purveyor taking Timber.

IN an Indictment of Felony upon the Statute of 5. E. 3. cap. 2. Rastall title Purveyors fo. 330. pla. 8. for the unlawfull taking away of certain Timber Trees by the Purveyors, and upon the triall at the Barre, the Case appeared to be this, the Partie Indicted, being a Deputy Purveyor, *propter usum domini regis* did take certaine Timber trees, which Sir William Fitzwilliams had cut down for his own use, and this he took against his will, and against the form of the Statute, without prising, and taking of the same, and converted the same to his own use. The Jury found his taking to be against the Statute, they found the whole matter, as it was, but gave a speciall Verdict, upon which verdict the only question was, whether this taking was felony, or not in him, within the said Statute, the Statute of 4. E. 4. cap 3. was read. It was urged that the Statute of 5. E. 3. is a generall Law, and that nothing shall be within the Stat. of 5. E. 3. which is not within the Statute of 4. E. 3. the Statute of 25. E. 3. cap. 6. was reade for purveying of Timber, and cutting the same down. It was likewise urged that the stat. of 5. E. 3. doth not extend to a deputy purveyor, but to the Purveyor himself. It was likewise urged, that the Timber which was here taken by him, was for the Kings Ships, (and not for his Mansion House, and this is given by the Statute of 25. E. 3. cap. 6. That this should be Felony, two matters were offered, as considerable in this case. First, if this taking be felony in the Purveyor himself. Secondly, if the same be felony in the Deputy Purveyor here, if the Statute extends to him, the taking is then to be pur le hostell le roy, the which signifies a Mansion House, this spoken properly, is taken to be for the Houses of Princes.—Inns of Court taken pro hospitio. The jury here found him to be a purveyor pro regalibus regiis, the statute of Articuli super chartas Edit. 28. E. 1. cap. 2. was cited concerning purveyors. And the power thereby limitted unto them, and how the purveyor, is to demeane himself in his takings for the King. And there exposition is made del hostel le roy. It was urged that this should be

Stat. 4. E 3. cap. 3.

Stat. 25. E 3. cap. 6.

1.

2.

Stat. of Articuli super Chartas 28. E. 1. cap. 2. Reasons to prove this taking to be felony.

felony

fellony within the Statute 1. by the ſtatute of Articuli ſuper chartas cap. 2. by which ſtatute none are to be purveyors, but for the hoſtel le roy the which ſtatute, is to be extended to a houſe as well as for the houſhold. 2. a ſecond reaſon grounded upon the Statute of 5. E. 3. cap. 2. which hath reference unto the Statute of 4. E. 3. cap. 3. and relates unto it. And the Stat. ſhall be conſtrued to be extended, to a deputie purveyor, as well as to the purveyor himſelf. Iohn Harris argued that this is not fellony within the Statute. The houſhold of the King, ought to have another conſtruction.——And other things—mentioned in the Statute, conſideration is to be had, what theſe other things, ſhall be conſtrued to be the ſtatute of 4. E. 3. cap. 3.—is alſo to be conſidered—by which it is ordained. And that if he take, and do carry away, by the Stat. of 5. E. 3. cap. 2. an oath is to be adminiſtered by the Stat. of 1. Iac. cap. 22. Raſtal title Cordwainers fo. 59. by which it is enacted that no purveyor, or his deputie ſhall ſell, or cauſe to be ſelled for the uſe of the Kings majeſtie, and any oaken timber tree, meet to be barked, but in barking time, (unleſs it be upon a ſpecial cauſe of neceſſity) for building or repairing of any his majeſties, houſes or ſhips. Vide Stamford fo. 37. touching purveyors, and 11. H. 4. fo. 28. where vitailes are expounded, being taken by purveyors, in ayde prior, where a purveyor, taking vitaile al hoſtel la roy. And is empleaded for it, that he ſhall have aide of the King. Williams Iuſtice this taking of wood by purveyors hath been cenſured, in the ſtarre chamber, and this was one Sackfordes caſe. And if he were cenſured, this taking then could be no fellony. In this caſe now here in queſtion, this taking, in manner as it is found by the jury, is not fellony. And this hath been, alſo formerly ruled, that a purveyor, may take wood, for the King, out of a wood-mongers wharfe, but not of the proviſion, that a private man hath made for himſelf. A purveyor cannot cut down wood growing, nor yet meddle with the freehold, of any man. But if a private man cut down wood, for to ſell, a purveyor may well take this for the King, who is to be preferred, next unto himſelf, and before any other man. Flemming chief Iuſtice et Williams Iuſtice both of them, held this taking here to be unlawful. Flemming chief Iuſtice where the timber is cut, for to be ſold, there the purveyor may take it for the King, according to the ſtatute the ſame being firſt priſed and other things obſerved, as the Statute requires. And this for the reaſon before given by Williams Iuſtice but otherwiſe it is, if the ſame be cut by a private man, for his own uſe. And he further ſaid that he, and all the reſt of the judges, had before ſo reſolved, as touching ſuch takings by purveyors, for the King. And to this Reſolution, they had all of them ſet their hands. And this they had done, to reduce it to a certainty, what the law was in ſuch a caſe, and for the better redreſs, and puniſhment of all ſuch unlawful takings by purveyors—the ſame tending very much unto the diſhonour of the King, and great grievance of the people. It was moved in this caſe, upon the words, in the Statute of 4. E. 3. cap. 3.—and other things, and an exception was taken, becauſe it is ſaid capit, and doth not ſay abbreviavit. but this exception was overruled by the Court, that this was good by intendment, and cannot be taken otherwiſe. And as to thoſe words in the Statute of—4. E. 3. (and other things) by the opinion of the whole Court, theſe words (other things) ſhall be conſtrued, and intended to be, things of the ſame nature with the former. And as to the matter of fellony; whether in this caſe, this manner of taking here, be fellony, or not, the Court at this time, would be further adviſed of it, before they delivered their judgements therein. Flemming chief Iuſtice. In, the former reſolution by the judges before mentioned, as touching purveyors. There was nothing then mentioned, nor reſolved by them as touching the point of fellony, in ſuch a caſe, as this now appears to be——afterwards, at an other time this was moved again, as touching the point of fellony. Whether this taking of the timber, as it is here found, and for which the party ſtands endited for fellony upon the Statute of 5. E. 3. cap. 2. be fellony or not, William Iuſtice. If a man

Stat. of 4. E. 3. cap. 3.
Stat. 5. E. 3. cap. 2.
Stat. of 1. Jac. cap. 22.
Roſtal tit. Cordwainers fo. 59.
Stanford pleas el coro-no fo. 37.
11. H. 4. fo. 28.
Stat. of 4. E. 3. cap. 3.
Stat. of 5. E. 3. cap. 2.

man takes my horſe, but doth not carry him away, is not this fellony? Flemming chief Iuſtice, this is not fellony here, by the common law, but ſo made to be by Statute law. Williams Iuſtice agreed with him herein, it is here laide that he was a Purveyor, and did take &c. Yelverton Iuſtice, As to the endict-
1. ment here for fellony, he is here out of the danger of the Statute, this being here, but in the nature of a ſeiſure, and here by this which was done, none is at prejudice thereby. By this Statute, there ought to be underſtood of neceſſity a taking away. For what cauſe, ought there here to be a praiſing made, as by the Statute it is appointed, if he do not take the ſame away, and untill this be ſo done, the King can have no benefit, nor yet the ſubject, any prejudice, the praiſment is not needful to be, if he take not the ſame away, the goods alſo ought to be taken, and if it be ſo, yet he is not in danger of the Statute, when he ſaith, I will have it for the King, and ſo for the matter of the endicement, the ſame is not good,
2. there being no juſt ground for it. Croke Iuſtice of the ſame opinion, as to any matter here for to call his life in queſtion, this endicement is not maintainable, this being, for taking of timber, this comes not here, within the danger of the
Stat. of magna charta cap. 21. Statute for fellony, ſee the Statute of Magna charta cap. 21. touching Purveyors, and how they are to take for the King, giving ſatisfaction to the party, as the Statute appoints, and if a Purveyor do fell any timber, without the will of the owner, for this they have been cenſured in the ſtar chamber, and have been adjudged to loſe their eares for it, but otherwiſe it is, if they were felled before, (unleſs the ſame were for his own uſe,) there ought to be here, an effectual taking, if he ſaith only, I will have the ſame for the King, and ſo goes his way, and leaves it, this is good, and no harme by this done, the ſubject being not
3. any wayes prejudiced hereby, but the taking of other things, by the Purveyor, (as victuals) contrary to the Stat. this is fellony. Williams Iuſtice of the ſame opinion, the rules of law are true, and by theſe rules, Statutes are to be expounded, and the expoſition is to be by the thing done upon the Statute, and he is not to be puniſhed here, as for fellony, by the Statute, there are 3. damages, happening to the ſubject, the which ought for to be prevented. Firſt, if he cut in the face of the houſe. Secondly, the Purveyor is not to take, contra voluntatem domini. Thirdly, there ought to be a taking away, or he is not culpable, the Stat.
Stat. of 5. E. 3. cap. 2. of 5. E. 3. cap. 2. extends not to timber, the houſehold here, have no authority to meddle with him for fellony, this taking here, as it is found, is not any fellony within this ſtatute, for that he hath no prejudice, by this which is done, if the King wants timber, the Purveyors may take it of the wood-mongers, for his uſe. The party here, in this caſe had no remedy, but by his action of treſpaſs,
4. Quare clauſum fregit, and not to queſtion him for fellony. Fenner Juſtice of the ſame opinion, that this taking, as it is here found, is not within Stat. of 5. E. 3. cap. 2. clearely, to make him, to be puniſhed, as for fellony. If the Purveyor, takes timber ſtanding, and do notch, or mark it out for the King, the houſhold, nor the treaſurer will pay, and allow him for it, unleſs the ſame do come to the
Stat. of 25. E. 3. cap. 6. uſe of the King, the Statute of 25. E. 3. cap. 6. impoſeth a penalty, on the Purveyor or taker, for cutting of wood of any mans, growing about his houſe. To render to the party his treble damages for the ſame, to have one years
5. impriſonment, and to be forejudged of his office. Flemming chief Iuſtice, the matter here conſiderable is, whether this taking of timber, by the Purveyor, as the ſame is here found by the Jury, be fellony, within the Stat. of 5. E. 3. cap.
Stat. of 5. E. 3. cap. 2. 2. or not, theſe Statutes, concerning Purveyors, and their takings by way of purveyance, for the uſe of the King, and of his houſhold, were made, for to meet with the enormities of Purveyors, exceeding their power and authority. It is to be conſidered, whether this Stat. of 5. E. 3. ſhall be extended to any thing that is taken, by a Purveyor, though this which was now taken, happen but ſeldome times, as for matters of repaire. No other intendment can be, upon this Stat. but for to meet with the daily takings, by Purveyors, (for victuals,)

and

& with a buſes in them the ſtatute of 5 E 3. cap. 2. ſaith, No purveyor—for whom—for the King—his Houſhold, and his children—it is not for ſhips, or for reparations to take the meaning of this Stat. is not to extend to any Purveyor to have a Taylee, as to the taking of the wood by a Purveyor, it is not a greater miſcheif, for to have a Purveyor to come, and to cut down Timber Trees, ſtanding and growing in the view of a mans Houſe, if for this cutting and taking in this manner, by a ſubſequent Statute, the partie taking ought but to render Dammages to the owner—a fortiori here in this caſe now in queſtion, this taking ſhall not be felony, the Stat, of 5. E. 3. cap. 2. ſaith, that he ſhall be a Felon—but when—if he do take, and not praiſe, and make a Taylee—then, &c. and by the Stat. of 25. E. 3. cap. 6. ſaith, that if any Purveyor, or Taker of Wood, or Timber, for the Kings uſe, do cauſe to be cut or felled the Trees of any man, growing about, or within his houſe, he ſhall for this pay to the partie, treble dammages, ſhall be impriſoned for one yeare, and loſe his Office, and by the Statute of Magna charta cap. 21. No Wood ſhall be taken for the King.—Nec nos, nec ballivi noſtri, nec alii capiemus boſcum alienum, ad caſtra, vel ad alia agenda noſtra, niſi per voluntatem illius, cujus boſcus ille fuerit. By the Stat. of 5. E. 3. cap. 2. it is made felonie in Purveyors, if they do take without praiſement made, and Tayles between the Purveyors and the owners of the ſaid goods ſo taken, the Statute of 5. E. 3. cap. 2. ſaith, That—the Corn, Cattell, and other victuall, and things which ſhall be taken for the uſe of the Kings houſe—and other things—this is as much as if it had been ſaid, (other things) or things of the ſame nature. Then as to the taking here, as it is found by the Jury (if one who is a Purveor, comes to another, and ſaith to him, Sir, here are good Oxen that you have, and I do make ſtay of them for the Kings uſe, and he ſaith to him, come you and praiſe them, and he comes not, his mind being changed, you ſhall not now for this puniſh him here, as a Felon for this, but he ought alſo for to take them away, as the Stat. ſaith, or he is not to be puniſhed as a Felon. it is no Felony if the Subject have no prejudice, for he may go with them to the Market preſently, and if th Purveor do not come, he may well ſell them, for he ought not to ſtay for him, a week or two, the Subject hath no harme, till there be a carrying away, contrary to the Statute, and this appears to be ſo by both the Statutes, the words of the Statutes being (taking) by this it is to be underſtood, to be ſuch a taking, by which the Subject ought to be ſo grieved, as that he cannot bear it, clerely he ought not to have been endicted for Felony, for the taking of this Wood, in manner as the ſame is found: neither is it felony within the Statute of 5. E. 3. cap. 2. but this manner of taking, as it is found by the Jury, was a very great offence in him, and for the which he ought to be well puniſhed, but yet not as a Felon, this taking of Wood being no felony within the Statute of 5. E. 3. upon which Statute he is indicted, and ſo by the Rule of the whole Court, Judgement was given for the Priſoner, that this taking of the Timber, as it is here found, is no felony within the Statute of 5. E. 3. cap. 2. and ſo the partie endicted, was by the Rule and Judgement of the Court, freed, and diſcharged: quod nota.

Judgement given by the Court againſt the King for the party endicted.

## Sir *William Turpine* Plaintif againſt *Forreyner* and others Defendants.

IN an Action of Treſpaſſe and Ejectment, the Jury found a ſpeciall Verdict, and upon the ſpeciall Verdict, the Caſe appeared to be this, a man being ſeiſed of a Mannor, and of a Tenement in fee ſimple, and poſſeſſed alſo of a Leaſe for years in the Ville of Dale, by a Deed of bargaine and ſale, he doth give, grant,

An Action of Treſpaſſe, &c.

grant, bargaine, ſell, enfeoffe, and confirm, unto another the Mannor, tenements, and all other the lands, and tenements which he hath in the ville of Da. the queſtion was, whether by this deed of grant, bargaine, and ſale, the term for years doth paſs or not. Geo. Croke for the Plantiff, that this leaſe for yeares doth not paſs, but only the lands in which he hath an eſtate of inheritance, the words of the deed, will not ſerve, to carry this eſtate for years, for he doth thereby give, grant, bargaine, ſell, enfeoffe, and confirm. &c. The which words are of force, and effect, only to paſs an eſtate of freehold and inheritance, and for 3. clauſes, mentioned in the deed, this leaſe for yeares doth not paſs thereby, 1. the words enfeoffe, give, and grant——the Mannor freehold, and all other his lands, and tenements, & Habendum to the barganee, and his heires, and this deed, by theſe words, can by no intendment paſs this term, which is only a chattel. Secondly, there is an expreſs covenant, in the conveyance, on the party of the bargaynor, that he was ſeiſed in fee ſimple, of all the ſaid lands, contained in the ſaid deed of bargaine and ſale. Thirdly, there is alſo therein another covenant by him, that he had an eſtate in fee ſimple, in all the lands thereby intended to be conveyed, and that he had good power and authority, to bargaine, and ſell the ſame, ſo that it doth appeare, throughout the whole conveyance, that there was no intention at all, on the part of the barganor, for to paſs this terme for yeares by the barganee, and ſale, nor yet on the part of the barganee, to have this leaſe for yeares paſſed unto him, but only, the one to paſs, and the other to have, an eſtate of fee ſimple, in all the lands by this bargaine and ſale, to him conveyed, and this being ſo, no violent conſtruction ſhall be made, upon ſuch general words; alſo if this leaſe for yeares ſhould paſs, by this deed of bargaine and ſale, a great inconvenience might thereby happen unto the barganee. &c. If a great rent were reſerved upon this leaſe, if the ſame leaſe, paſs by this bargain, and ſale, the barganee ſhall be then ſubject unto this charge, to pay the rent, there being no clauſe in the deed, to free and diſcharge him from the ſame; alſo by this deed, he hath granted, bargained, and ſold, &c. but yet by this deed, no more doth paſs, but that which he might lawfully paſs, by intendment of law. Alſo by this deed, he doth bargaine, and ſell all his lands——by theſe general words, this leaſe for yeares doth not paſs, and ſo is the caſe in 37. H. 8. Brooks caſe fo. 67. pla. 301 Brooke title Done pla. 41. Dicitur pro lege, if a man give omnia terras, et tenementa ſua, in Da. by this, leaſes for years do not paſs, for that hæc verba, terras et tenementa, ſhall be entended freehold at the leaſt, and with this agrees—7. E. 6. Br. caſes fo. 96. Pla. 438. Br. tit. grante pla.---- 155. If a man doth grant, omni terras et tenementa ſua in Dale, by this, a leaſe for yeares doth not paſs, otherwiſe it had been, if he had granted omnes firmas ſuas, by theſe words, a leaſe for yeares doth paſs. But it may be objected, that this leaſe for yeares ſhould paſs, by other words, in the conveyance, (S)and all other his lands, and tenements, and there were no other lands, in the ſaid ville----to ſupply theſe words in the grant, but only this leaſe for yeares, and therefore the ſame ſhould paſs: to this it may well be anſwered, that this is no object. at all, for that this ſhall be intended, (all others) &c. that this is as much as to ſay, all others, of the ſame nature, quality and condition as the other lands, before mentioned were, and not otherwiſe, and therefore theſe general words, and all other lands----&c. ſhall not be intended, or enlarged, by any conſtruction, for to paſs this leaſe for yeares, and to this purpoſe it was adjudged, 18. Eliz. 2. between the Lord North, and the Biſhop of Ely. That where the predeceſſor of the Biſhop, had made a leaſe to him, of his Mannor houſe, of the ſcite thereof, and of certain particular cloſes, and demeſnes, by particular name, (and of all other his lands and demeaſnes,) upon this, it was queſtioned, whether an antient Park, and coppihold land, there ſhould paſe, and by the rule of the Court, neither of them did paſs, by thoſe latter general words, for that neither the park, nor yet the coppihold, could be intended for to be demeſnes, and

3. Clauſes in the deed to prove that the leaſe for years did not paſs.

1.

2.

3.

37. H. 8. Br. caſes fo. 67. pla. 301. et Br. tit. Done pla. 41.

*Object.*

*Reſp.*

A violent conſtruction ſhall not be made of general words. but by intention of law.

and that in ſuch caſes a grant ſhall not be conſtrued by any violent conſtruction, but according to the intention of Law; and therefore it is ſaid in Plowdens Commentaries fo. 106. in Hill, and Granges caſe, that ex præcedentibus, & conſequentibus, optima fiat interpretatio, and that benigne faciendæ ſunt interpretationes, and the ſame to be according to the intention of the parties, 12. E. 1. Fitz. tit. Grants pla. 87. a man leavies a fine of a Mannor, to which an Advowſon is appendant, cum pertinentiis, the Advowſon here doth paſſe, but there adjudged, that if the Advowſon were not ſpecially named, nor put cum pertinentiis, the Advowſon there would not paſſe, and ſo here in this caſe upon the whole matter, the Leaſe for years did not paſſe by this Deed of bargaine and ſale, and therefore he prayed judgement for the Plaintif. Note, that this caſe, without any further argument, was ruled by the whole Court againſt the Plaintif, (not upon the point in Law) whether the leaſe for yeaſs, do here by this deed of bargaine and ſale paſſe, or not, but for matter of pleading, for that the treſpaſſe was not laid to be immediately upon him, the ſpecial verdict reciting, quod ſit poſſeſſionatus prout lex poſtulat, and for this cauſe, for default in pleading, the Judgement of the Court was againſt the Plaintif, and the Rule entred Quod querens nil capiat per Billam. But Nota, that as to the matter in law being whether this leaſe for years did paſſe or not, by this deed of bargaine and ſale, and by the generall words therein contained, and ſo found by the ſpecial. Croke, Williams, Yelverton, and Fenner Juſtices declared their opinions, that as to this, they held it a ſtrong caſe for the Plaintiff, that by the generall words in this deed of bargaine and ſale, the leaſe for years here did not paſſe; quod nota.

Judgement for the Defendant Quod querens nil capiat per Billam, for the default in pleading, but per Curiam the leaſe for years here did not paſſe.

## *Hawes* Plaintif againſt *Loader* Defendant.

IN an Action of Debt upon a Bond againſt the Defendant as an Adminiſtrator unto I. S. who entred into the Bond to the Plaintiff, and for not payment of the money by the inteſtate in his life time, nor yet by the Defendant his Adminiſtrator ſince his death, the Action was brought, the Defendant pleaded actio non for that he had no more remaining in his hands, but only to ſatisfie a Statute in which he was bound, & ultra ceo ad riens en ſes maines, the Plaintiffe replies and ſhewes, that this Statute was only for performance of certaine Covenants which were all performed, and no breach of any, ſo that he hath aſſets ſufficient in his hands to pay this Debt, and it hath been here adjudged, this to be no good plea, the Court cleere of opinion, that the plea in this caſe is not good, being in an Action of Debt againſt an Adminiſtrator, who pleads in Barre, that he only hath ſufficient to ſatisfie a Statute, & ultra ceo ad riens enter maines, ql. Stat. was by him kept on foot, to defraud Creditors, and therefore Judgement was given by the Court for the Plaintif.

Debt upon a Bond. &c.

Judgement for the Plaintif per Curiam.

## *Syliard* Plaintif againſt ——

IN a Replevin, for the taking of a Colt, and a Cow, the Defendant in the right of another, and as his ſervant, or Baillife, avowes the taking of them, nomine heriotorum, ſhews that I. S. being Lord of ſuch a Mannor, and the Father of the Plaintif being a free Tenant of the ſaid Mannor, and holding ſeverall parcels of his Lands of the Lord by fealtie, and Heriot, and laies the cuſtome of the Mannor to be; that upon the death of every free Tenant, the Lord of the Mannor for the time being hath uſed to have a Heriot for each parcell thus held, that the Father of the Plaintif held ſeverall parcells of Land of the Lord of the ſaid Mannor, by Fealtie and Heriot, and that he dying, by his death, a Heriot was due to the Lord & tempore quo he did in the right of the Lord take the ſaid Colt and Cow, nomine heriotorum for the ſaid parcels of Land ſo held by him, and ſo for this cauſe he avows and juſtifies the taking.

Syliards caſe, &c.

To

Exceptions to an Avowry for taking cattell for Heriots.

To this avowry the Plaintif Demurres, and for cause takes divers exceptions to the avowry, as first, because he saith, that he did take them, nomine heriotorum, and doth not shew in particular, wherefore he takes them, secondly, he saith, that parcell of the Land, was held by fealtie, and heriot, and so of another parcell held in like manner, this generall avowry here of the taking of this Colt and Cow, nomine heriotorum, is not good, but insufficient, being for severall services, and therefore he ought to have shewed in particular what he did take for the one, and what for the other, but where the Tenure is by an entire service, there he may well awow for the whole, and so is the Book of 44. E. 3. fo. 13. pla. 24 In a Replevin, the Defendant doth avow for Heriot, of one John, who died his Tenant, of an Acre of Land heriotable. Also, the Declaration here is severall, for the taking of the Colt, and of the Cow, and therefore the Answer unto this, ought also to be severall. A third exception was taken to the Avowry, for that the custome here is not well, and sufficiently pleaded, the same being pleaded in this manner, that the Lord after the death of every one of his Tenants, is for to have a Heriot, (the Lord for the time being) First, it is said, that if any Tenant dyes, the Lord (pro tempore) hath to have, after the death of every one of his free Tenants a heriot, this contrary in it self, and so not good. A fourth Exception, was taken to the Avowry, for that therein it is set forth, that if any tenant die seised, the Lord is to have a heriot, and doth not shew, of what estate he should die seised: for in one case, a heriot custome, may be due, and in another case, it may be a heriot service. H. Yelverton argued to the contrary for the Defendant, the Avowant, and that the Avowry, and the justification thereby, as well, and sufficiently pleaded, he doth justifie here under another, (s.) under the Lord of the Mannor, and shews how that the Father of the Plaintif died, his free Tenant, and that by his death a heriot, was due unto the Lord, as to the exceptions taken. First, because he doth shew specially, and in particular, wherefore he took them, as to this he needs not so to do, for the Law saith, he takes them for heriot, and this is a duty presently, and an interest setled, and here he shews for cause, that he took them nomine heriotorum, and this is well, & Br tit. Herito pla. 6. & Fit. tit. Avowry pla. 177. is a far stranger case, then the case here in question, there the case was in trespasse, for taking away his Beasts: the Defendant saith, that one I. held of him, and that he was to have a Heriot after the death of every one of his Tenants, and for cause shewed that I. dyed, and had a Beese, which was his best Beast, which Beef was essoigned, and that after the Land descended to one I. who dyed and had a Horse, which was his best Beast, and was essoigned, and for that he found the Beasts within the Land there, he did take them for the Heriots so essoigned, and this was there adjudged to be a good answer, and a good justification, for to say he took them for Heriots, and so in this case, it is sufficient to say generally, that of every Tenant dying, dominus manerii is to have a heriot, so that the Avowry here is good and certaine enough, and so prayd judgement for the Defendant the Avowant. Williams Iustice, the Avowry is good, and judgement ought to be given for the Defendant, according to the Rule in 2. H. 6. fo. 3: that if any thing be found for the Avowant, he is then to have a return, and so by the Rule of the Court, the Defendant is to have a return of these Cattell by him taken for heriots, and by Williams, Yelverton, and Fenner Iustices, the Avowry, and the justification is good, and well pleaded, and that the Defendant is to have a return of the Cattell, and so the rule of the Court was, quod intretur judicium pro defendent. pro retorno habendo.

1.

2. Nota le difference between entire and severall services.

3.

4.

Judgement given for the Defendant.

*Barton*

## *Barton* Plaintiff againſt *Sadocke* Defendant entred Paſch. 7. Jac. B. R. Rot. 416.

IN an Action of accompt brought by the Plaintif being a Merchant, againſt the Defendant his Factor, for certaine Jewels which he had delivered unto him for to merchandiſe for him beyond ſea, for his beſt profit; The Defendant by way of Plea ſaith, and avers that he had ſold the Jewels to Mulleſhake, the King of Barbary for the beſt profit he could, and that he was to have returned the money, (being 45. l. the which he hath not as yet done. To this Plea, the Plaintif demurred in Law. The point only being whether this plea, and the juſtification thereby, be in the judgement of Law good, or not. It was urged for the Defendant, that the Plea, and juſtification was good, and ſo the Plaintif had no cauſe to demurre, and to prove this, theſe Books were cited 9. E. 4. fo. 4. If a man baile goods to another, to keep as his own goods, and they are ſtollen from him, he ſhall be excuſed 2 R. 3. fo. 13. 14. pla. 26. in caſe of a Factor, and 2. R. 2. Fitz. tit. accompt. pla. 45. in accompt of moneyes received, to Merchandiſe withall, where it is ſaid by Belknap. that if a man receive goods of another, to profite, and Merchandiſe withall as for him, the owner of the goods in this caſe ſhall ſtand to the good, and to the loſſe of all, as it happens, and falls out, and ſo it was urged here, that as the Maſter is to have the profit, ſo he ought likewiſe to beare the loſſe and prejudice, if any do happen, here by his plea he ſheweth, that he hath ſold the Jewels, and this is ſufficient, and he hath alſo here averred ſpecially, that he hath ſold them, for the beſt profit of his Maſter, and more he cannot ſay, and ſo concluded the plea to be good. Hen. Yelverton for the Plaintif, that the Plea of the Defendant is not good, and ſo the Plaintif had good cauſe to demurre in Law, the Defendant here by way of Plea, ſaith, that he had ſold the Jewels to Mulleſhacke the King of Barbary by way of Indenture, and that he had done this for the uſe of the Plaintif his Maſter, peradventure this may be ſo, and peradventure not, ſo that this his Plea and Allegation is altogether uncertain, and ſo not good: for he ought by his Plea to have made a certaine anſwer, and to have certainely ſhewed, how he had performed the truſt and authoritie in him, by his Maſter repoſed, the which he hath not here done, for he ought to have ſhewed, and averred in his Plea, that he had accounted with his Maſter, for the increaſe of the money, being 45. l. and that at ſuch a day he had received the money, and ſo to this purpoſe is the Book of 22. H. 6. fo. 55. and the Plea here is inſufficient, and the Demurrer good, and prayed judgement for the Plaintif. Williams Iuſtice clearely, this Plea of the Defendant is not good, for the tryall of this, ſee the Book of 41. E. 3. fo. 3. 4. pla. 8. if a man doth deliver goods to another to keep for him in his hands, he ought for theſe goods to render an accompt. Barbary may here be laid to be in Kent, and ſo the ſame may well be tried, it appears by the Booke of 3. E. 3. fo. 5. pla. 13. hee which receives money, for to render an Accompt, is to account for the profit which he might have made of the ſame. Yelverton Juſtice, if the Defendant were appointed to ſell theſe Jewels in Barbary, he ought then in his plea to have the ſame certainty averred, to whom he had ſo ſold them, and in what place he dwelt, all the Merchants agree, the common practice amongſt them to be, that in ſuch a caſe the Factor ought either to return the goods again, or elſe money for them, to his Maſter. Williams Juſtice, the caſe before cited in 3. E. 3. where a Merchant gives a generall Authoritie to his Factor to Merchandiſe for him, and to truſt, the which is the uſuall manner of Trade amongſt them for to truſt for a time certaine 28. H. 8. Dyer fo. 29. pla. 193. In an Action of accompt, the Plaintiff counts, that the Defendant received Tinne of the Plaintif for to render an accompt, the Defendant for Plea ſaith, that he ſold the Tinne to one I. S. and took an Obligation for this money, in the name of the Plaintif

An action of accompt againſt a Factor.

9. E. 4. fo. 40. b. ſide pla. 22.
2 R. 3. fo. 13. 14. pla. 26.
2. R. 2. Fitz. tit. accompt. pla. 45.
22. E. 6. fo. 55. 1.
41. E. 3. fo. 3. 4. pla. 8.
3. E. 3. fo. 5. new impreſſion & fo. 68. old pla. 13: 2.
28. H. 8. Dyer fo. 29. pla. 193

Plaintiff the Baylor, this is there held no good plea in barre of the accompt, but it is a good plea before the Auditors by way of discharge. Yelverton Iustice, it is set forth in the plea here, that he sold the Jewels to the King of Barbary, what remedy shall he have against the King of Barbary, for the money for which they were sold, by the Book of 41. E. 3. fo. 3. the Defendant here ought to swear his Plea, which he hath not done, so that the plea, as it his here pleaded, is not good. Williams Iustice, this is no good accompt made by the Defendant, for these Jewels to him delivered by the Plaintif, to say, as he doth here by his plea, that
3. he sold them to Mulleschalk, King of Barbary, this plea doth not amount, to any accompt at all. Flemming chief Iustice, the Defendants plea here is faulty, both for the matter, and also for the manner of it, the Demurrer here is both to the matter, and to the manner of the Plea, he ought to sell here for the best profit of the Plaintif his Master, and by the intendment of Law, he ought here to render a full and plenary accompt, and he ought in performance of the trust in him here reposed by the Plaintif, either to return the commoditie again to his Master, which was delivered to him, to Merchandise withall, for the best profit of his Master, or else to bring the money with him, for which they were sold, and to deliver the same to his Master. In cases of authorities given to one, (as in this case here) to sell any thing, as a Factor, in the due execution of this Authoritie, he ought presently upon the sale thereof to have and receive quid pro quo, other wise he doth not well perform the Authoritie, thus to him given, neither ought he upon the sale thereof, for to give him any further time, or day of payment, but as he delivers the one, so he ought then presently, at the same time, to receive the money for the same for which it was sold. Factors ought for to render true, just, and perfect accompts, in discharge of the trust in them reposed: here he saith by his Plea, that he sold the Jewels (with which he was intrusted to merchandise withall) to the King of Barbary, and that he had a Bill of him, for payment of the money, this is no good plea, for the matter of it, for that his master can do nothing at all with this bill, for the recovery of his money, but that this is a meere fraud and deceit, and for which the Defendant is to be punished, and he ought to answer this that which he hath here in his plea, the same may be true, and it may aswell be false, hee ought to have sold here these Jewels, thus to him delivered, for the best benefit of his Master, the which he hath not so done by this his sale (as appears by his Plea) in such a place, to such a person, and in such a manner, what if he had said in his plea, and justification, that the King of Barbary had taken these Jewels up, at such a price, and had promised payment of the money, and hath not done it, this had been all one, as if he had said, that he had been robbed of them, this is no colour for him thus to justifie, if a man commands his Baily to sell for him, so many fat Oxen, and if afterwards he calling of him to an accompt for the same, who answers, that he had sold them, and being demanded to whom they were sold, for what, and where the money was, if he doth make this answer, that he had sold them to I. S. and that he hath his Bill for payment of the money, this is no good answer, for that the party is never the better for it, and he had no such warrant, to him given, to sell the Oxen, and to take a Bill for payment of the money, but his Authoritie to him given, was to sell them for ready money, and to bring the money, for which they were sold, with him. Also every Factor hath not such a power given to him, to trust, for the commodities by him sold, but some Factor may have such a speciall power given him, thus to sell, and upon a day given for payment, as he shall agree, and see cause, but such a Factor as hath only a bare authoritie for to sell, hath not by this, any power, or authoritie given him, upon sale made, to give day, for the payment of the money, but he ought to take and receive the money presently upon the sale made. So if a man do authorise his Baily to sell any thing for him, if upon his being called to accompt, saith that he hath sold the same to such a one, and names him, but saith further, that he hath given him ten years time of payment of the money, this is no good answer,

nor

nor any wayes justifiable, and this would be a very dangerous Case, and if way should be given by us for the allowance of such a plea, this would be a very ill president, and by such a way (if this should be allowed, all Merchants which do repose such trust and confidence in their Factors, may easily be deceived, and very much prejudiced thereby. Croke Justice, this is a very weighty case, and of great consequence, this Plea here of the Defendant is bad, and altogether insufficient, he had these delivered to him for to sell, & ad rationabilem computum inde reddendum, whensoever he should be thereunto required, and this is Lex mercatoria, and no Survivor to be between them, and the Defendant here had these goods, to him delivered ad faciendum proficuum, meliori modo quo poterit, and if covin apparant, be used by him, as in this case here, it is, this is not rationabilis computus, nor can so be, so that this Plea here is cleerely bad, and so the Court all agreed against the Defendant, the Factor, that his Plea was every waies insufficient, and that the Plaintiff had just cause of Demurrer, and so the Rule of the Court was nollo contradicente, quod judicium intretur pro Querent.

Judgement per curiam for the Plaintif.

Nota, that upon the return of a Commission, to certifie the Court of some proceedings, the Case appeared to be this. The Writ was directed unto eight Nominatim, and seven of them only do certifie, and whether this were good, or not, was the question. Henry Yelverton excepted against this return, that the same was not good, for the Writ being here directed unto eight specially, and by name, all the eight ought for to joyn in their Answer, in this return, and this was the reason, which moved the Court to have the same Writ directed unto Sir Henry Lynley, as the eighth man, because that they intended all the 8. should make the return, and the return here made by seven, is not good, this is to be taken as a principall of speech, that here is an enumeration of persons certaine, and the same so done non exclusivè to exclude any, but positivè to include all, and that this should be so, appears by the Book of 2. Assisar. fo. 3. pla. 5. & 2. E. 3. Old impression fo. 35. pla. 2 & Brook tit. Attaint. pla. 47. An Attaint brought upon a Verdict, which passed before Judges of Oyer and Terminer, the Writ mentions that the Verdict passed before foure Justices, and the Record proves that it was taken, but before two, it was there said, that the Judges had no warrant for to take the Attaint, and the Court there agreed in this, that the Attaint should not be taken, the like Case see Termin. Hillar. 2. E. 3. Old print. fo. 21. pla. 13. Sir Francis Bacon Sollicitor generall argued to the contrary, that the return here by seven of the eight is good, for that this is a Principle in reason, and that infallible, quod omne majus continet in se minus, and upon this Reason is the Case in the Book of 31. Assisar. pla. 1. & Brooke tit. Variance pla. 37. where Thomas de Westate brought an Assise of Novell Disseisin against James Franke, and makes his plaint of a Rent, the Defendant prates in aid of the King, the Plaintif had a Writ of Procedendo, by which Writ, it is supposed, that the Assise was arraigned before Stouse, and Biron, whereas the same was arraigned before Sharde, Stouse, & Biron, and therefore judgement was demanded, whether upon such a Writ, they would take the Assise, or not, Stouse there saith, that this Writ doth suppose no sanitie, for if it were arraigned before us three, ergo before two, and also we have the Writ, Si non omnes, and therefore answer, so that this is there ruled to be good, for if the same were arraigned before three, it was then before two, and with this agrees the case in Plowdens Comment fo. 393. a in the Countie of Leicesters case by Manwoods, where a Commission was granted to fifteen to take an indictment, authoritie by the same given to them 15. & to every 4. of them, or more, whereof 2. at the least to be of the Quorum to take the endictment, & this was taken before 8. only having a sufficient number of the quorum.

A Writ directed unto 8 and 7. only certifie.

2. Assisar fo 3. pla. 5 & 2. E. 3 old impression fo 35. pla. 2. Brook tit. Attaint pla. 47.

Plowdens Comment fo. 393. the Countee of Leicestes case

The only point was, whether this Endictment thus taken, was well taken, or not, it is there ſaid, and caſes put to prove it, that time certain, to which Acts are referred, is materiall, and ſo likewiſe ſhall it be in caſe of place, as if one pleads Letters Patents bearing date at Weſtminſter, where the ſame bears date at another place by 38. H. 6. fo. 34. 36. and 37. by Croke, Littleton, Moyle, and Priſot, for this variance he hath failed. Comment fo. 393. divers caſes there put, where a thing is referred to a number, this is materiall as in a Rediſſeiſin upon the Statute of Merton cap. 3. in mandetur vic. quod aſſumptis ſecum cuſtodibus placitorum Coronæ domini Regis, &c. it is adjudged in 23. E. 3. lib. Aſſiſar. pla. 7. that the Writ ſhall abate, where the Sherif takes with him, but one Coroner, where there were more in the Countie, here in this caſe, the return by 7. is good, for that non preſumitur pluralitas, unleſſe the ſame be ſhewed, the Book of 28. H. 6. fo. 11. & 12 hath ſome ſhew of authoritie, to make againſt me, where the caſe was this. A Writ of Error was directed to the Juſtices of the C. B. to remove a Record, and the Writ was in this manner, Rex Iohanni Priſot, capital. juſticiario noſtro de Banco ſalutem, quia in Recordo & proceſſu, ac etiam in redditione judicii loquelæ, que ſunt coram vobis, &c. inter—where it was Objected that the Writ was not good, for that the ſame ſhould have been Coram vobis, & ſociis veſtris, the Records & les Rolles, being all of this form, and therefore there was no ſuch Record here, and therefore this Writ was not ſufficient for to remove any Record from thence, but he was enforced to ſue forth a new Writ: another Caſe was there cited, to be in the Exchequer-Chamber, the which was Rex Theſaur. & Baronibus Scaccarii, &c. quia in recordo, proceſſu, ac etiam in redditione judicii, & quæ ſint coram vobis, &c. and for that the Records of the Exchequer are coram Baronibus, and not Theſaurariis & Baronibus, he was awarded for to ſue forth a better Writ. But in Anſwer to this, there will be a difference to be obſerved, for in the Caſes before cited, this appears to you to be ſo, as Judges, and you do know this as Judges, that this was not to be ſo, and therefore, &c. but it is not ſo here in this Principall caſe, for that this is not a matter that lies in your notice, alſo in the former caſes remembred, the forme is ſo, which is to be obſerved, and it would be very dangerous for to alter this form, and the Judges are to take notice of this, and ſo not alike here: there is no ſuch uſuall courſe, nor yet notice, and therefore differing from the former, here the execution of this Commiſſion may very well recipere majus, & minus, it may be that ſome of the Commiſſioners did not ſit, and therefore they which did not ſit, were not to certifie. Yelverton Iuſtice, If a Commiſſion be directed to three may two of them meddle with the Execution of it, they cannot. Henry Yelverton, the return ought to be, as the Writ, or Commiſſion is, which is here directed to them all, and ſo all of them ought to joyn in the return, and all to certifie. Yelverton Iuſtice ſaid to Sir Francis Bacon Sollicitor, if you would have this to be a good Return here, it would be very dangerous, and you muſt herein overule the whole Court, for who are all of us of a contrary Opinion to you. Williams Juſtice, here is a ſpeciall Commiſſion directed unto eight, if ſeven of them only return this, this is not good, and we are ſo here to intend it, that they have all of them Authority joyntly, and not ſeverally, and this Caſe here is not like the Caſe in the Commentaries in the Conutee of Leiceſters before remembred, where it is there with a Coram vobis, or before as many of them as ſhould be there preſent, but here in this Caſe now in queſtion, it is not ſo, and therefore all of them ought to joyn in the return, and becauſe they have not ſo done, the return is not good. Bacon Sollicitor, if a writ be directed Coronatoribus, and there are four Coroners, if two of them return this, is not this return good. Williams Iuſtice, where the Writ is directed generally to all, there all of them ought to joyne in the return, the whole Court agreed with him herein, and that in this caſe here they ought to have joyned in this return. Yelverton et Williams Iuſtices, and the whole Court agreed with them herein, that the power here

38. H. 6. 34. 37. Comment fo. 393.

28. H. 6. fo. 11. & 12.

*Object.*

*Reſp.*

here given to the 8. persons named in the writ, is a joynt power, and not a several, and so ought to be pursued by them in their retorn, and the same is not to be otherwise unless it be so set down and specified, and shewed in certain their power and authoritie to be both joynt and several, otherwise it shall not be so construed to be joynt and several, but only joynt, and so it is here in this principal case, the writ being directed to 8. and 7. of them only make the retorn, this retorn is not good, and so was the opinion of the whole Court cleerly.——— Flemming chief Iustice, if a writ of Diem clausit extremum directed unto 3. and be executed but by 2. of them, (unless it be expressed specially in the writ, that the same may be executed, by them all 3. or by any 2. of them) this is not good, and so it shall be in all such special Commissions, they ought to be specially executed, according to the Commission to them directed, and they are not to varp at all from it. And so in this principal case the whole Court agreed cleerly, that the retorn here made by 7. the writ being directed unto 8. is no good retorn, but all the 8. ought to have joyned in this retorn, quod nota, this being the cleer opinion of the whole Court.

The writ directed to 8. and 7. make the retorn adjudged this retorn not to be good.

## *Hampton* Plantif against *Courtney* Defendant,

IN a writ of error, the same was assigned in the manner of the entering of the baile, the case appeared to be this, in an action of debt, baile was entred for the Defendant, judgement was given for the Plantiff, for the reversing of which judgement a writ of error was brought, and the error assigned and insisted upon, was in the manner of the entry of the baile, the same being sub pœna executionis, in adjudicatione executionis, the error assigned, because that the baile was taken, and entred but only for part, (S) for the execution, but not for the judgement, as it ought to have been, (as it was urged,) Nota per Curiam, that if a man be in execution upon a judgement, he cannot have baile entred for him for part of the debt upon the judgement, but the baile must be for all, for the bailment ought to be taken according to the judgement, and so, be agreeable with the same the baile is to be, sub pœna condemnationis; and all bailes ought so to be, and in this manner to be entred, per Curiam, error may be in adjudicatione executionis, the baile ought to be for the whole, here in this principal case, the baile was taken as to the execution, but not as to the judgement, as the same ought to have been. Williams Iustice, such manner of baile ought for to be refused, and so he said, he alwayes did—— the writ of error here brought, and the error assigned, was----- in adjudicatione executionis, and the execution for error in the same reversed: and the Court was moved to have the baile now discharged, being only taken, and entred as to the execution, the which being for error reversed, the baile ought to be discharged. But the Court refused to discharge the baile, for that cleerly the baile being once taken, stands for all as well for the judgement, as for the execution, and therefore they would not discharge the baile, notwithstanding the Recognisance of the baile, was only pro adjudicatione executionis, but this by the rule of the Court was to be amended, and made to be sub pœna executionis judicii, as well as for the execution, and so the same by the rule of the Court, was ordered to be amended, and the Recognisance to be, sub pœna condemnationis, as well as in adjudicatione executionis, quod nota.

A writ of error in the entring of bail.

The recognisance for the bail amended per Curiam, and made to be for the judgement as well as for the execution.

Note, as touching the proceedings in the Court of Requests, and their jurisdiction the case was this. A man did take an oath in the Court of Requests, in a business there questioned, concerning matter of freehold, and for this oath



One questioned for perjury in an oath taken in the Court of Requests, where matters of freehold was in question.

there ſo taken, he was brought into the Starre chamber, and there queſtioned for perjury in this oath, and the perjury was fully proved againſt him, but whether this was perjury in him or not, the oath being there taken by him in a buſineſſe concerning matter of Freehold, was the only queſtion, and for the better determination of this, the ſame was, by the Court of the Starre-chamber, referred to all the Judges of England, to deliver their opinions in this caſe, whether the cauſe (in which this oath was taken) was within the juriſdiction of the Court of Requeſts, or not. It was reſolved by all the Judges meeting upon this reference, that the Court of Requeſts had no juriſdiction at all of the cauſe in which the oath was taken, this being matter of Freehold, and for this cauſe, the Oath being there taken by him in a Cauſe of which they had no juriſdiction, it was cleerely reſolved by them all, that this Oath by him thus taken, was upon the matter no Oath at all, to bring him in queſtion, for matter of Perjury, the ſame being by him taken coram non judice, and this was the opinion of all the Judges of England upon this reference to them, as Williams Juſtice did cite, and remember the ſame, and that the Court of Requeſts had no power nor Authoritie to hear, and determine of any matter of Freehold, and ſo upon this reſolution of the Judges, the partie was acquitted for the matter of perjury, in the Starre-chamber proſecuted againſt him. Williams Juſtice, cleerely the Court of Requeſts hath no juriſdiction, for to decree matter, which concernes Freehold, and we will not ſuffer them to have any ſuch Juriſdiction in ſuch caſes, which do not appertaine unto them, and no conſent of the parties to ſubmit themſelves, to the Judgements and determination of that Court in ſuch caſes, will any wayes aide them, or give them any Juriſdiction, which by the Law doth not belong unto them.

Note, where upon a libell for Tithes, a prohibition, & where a conſultation ſhall be granted.

Nota, upon the Statute of 2. E. 6. cap. 13. the Parſon libells for Tythes, and upon this the caſe appears to be in this manner, the Pariſhioner which was to pay his Tythes, ſets them out according to the Statute, but they being ſo ſet out, he would not ſuffer the Parſon to come and take them away, thinking by this meanes, and this way to avoid the Statute, and upon this the Parſon libels in the ſpirituall Court for theſe Tithes, the Defendant there ſurmiſes, that he did not hinder him, from the having of his Tithes, but ſaith that he did hinder him, in comming for his Tithes one way, (which was the uſuall way) but that he might have come for them, another way, and upon this a Prohibition was prayed, and granted, ſuppoſing, that here was no queſtion at all, as touching the payment of Tithes, but as touching the way to come for them, and upon this whole matter, the Parſon prayed a conſultation. The whole Court cleere of opinion, that ſuch a ſetting out of Tithes, as the ſame appeared to be here in this caſe, without ſuffering the Parſon to come and take away his Tithes, that this is a Fraudulent, and no good, and ſufficient ſetting forth of Tithes, according to the Statute, and as the Statute doth require, which ought for to be a fruitfull and effectuall letting forth of his Tithes, for in ſo doing, he ought to ſet forth his Tithes, and alſo to ſuffer the Parſon, to come, have, and to take away his Tithes, otherwiſe, unleſſe he do alſo alſo perform this, the ſetting out of his Tithes here is to no purpoſe, for to excuſe him, and to the ſurmiſe here made for the way. The whole Court cleere of opinion, that this is no wayes at all all materiall, and ſo without any further motion or argument, by the Rule of the Court, a Conſultation was granted, quod nota.

A conſultation granted.

*Ancient demeſne a good plea, and where.*

Nota, by Williams and Fenner Juſtices, That Ancient Demeſne, is a good plea, in an ejectione firmæ, and ſo it is likewiſe in a Replevin, and this was ſo agreed by the whole Court, and ſo is the Book of 10. H. 7. fo. 14. that the ſame is a good plea in a Replevin.

Nota,

Nota, by Yelverton Juſtice, That if an Inne do uſe the Trade of an Alehouſe, this ſhall be within the Statutes of Alehouſes. Croke Juſtice, No Perſon is for to erect an Inne, without a Licence from the King. Fenner Juſtice, the Statutes for Alehouſes, include all, (excepting only Boothes in fayres) not to keep an Inne, and an Alehouſe: but to be ſuppreſſed, to keep an Inne, only for the reliefe of Travailers, the whole Court agreed in this.

An Inne not to uſe the Trade of an Alehouſe, the ſame being for Travellers.

## The *King* againſt *Francis Lemman*.

WHo was endicted, firſt, of manſlaughter, and afterwards of murder, the endictment returned hither into this Court, exception was taken to quaſh the endictment, being that adtunc, & ibidem cum pugione in ſiniſtra parte collis percuſſit—whereas it ſhould have been (Colli) this was held a good exception by the Court, and that the Endictment is not good: the Court was then moved, that this exception was not to be taken to overthrow the indictment, becauſe the partie indicted, was outlawed upon this, before the Coroners: the Court then anſwered, that if it be ſo, this exception cannot be taken to the Endictment, and therefore the Court did order ſearch to be made, and the court to be informed, whether he ſtand outlawed, or not, and if ſo be outlawed, then he hath no other remedie, but a writ of Error, and this is his right courſe.

Exception to quaſh an indictment of murder.

## *Tabbe* Plaintif againſt *Matthew* Defendant.

IN An Action upon the caſe for words, upon not guilty pleaded, a Verdict was given for the Plaintiff, and upon a motion made in arreſt of judgement, the words laid in the Declaration, appeared to be theſe (s.) being ſpoken by the Defendant to the Plaintiff himſelf. Thou (meaning the Plaintiff) haſt hoiſtered theeves, and ſtollen goods, and the Theeves, and the goods were found in your houſe, and the Theeves were had before ſuch Juſtices, and committed by them to priſon, and were hanged, and if the Juſtice had not been your friend, it had been hard with you, it was moved in arreſt of Judgement, that theſe words are not actionable, they being too generall, as to the words, hoiſtered, that is, oſtered or houſed, this is all one, that theſe words ſhould not not be actionable, this Caſe was cited, being an Action upon the Caſe for words (being) you were partakers with the Rebels in the North, and held not actionable for the generality of the words, in aſmuch as it was not laid in certaine, that he had knowledge, that they were Rebels, as it ought to be laid, and for this reaſon it was here adjudged, that theſe words were not actionable, ſo here in this caſe, becauſe it is not laid, that he knew a felony was done, and that theſe were Felons, and the goods Felonious goods, and unleſſe he knew this to be ſo, he can be in no danger, by houſing of them, or their goods. The Court was cleere of opinion, that the words, take them altogether, as they are here laid in this Declaration, are very ſcandalous, and well Actionable, the latter ſubſequent Words, being Words of very great ſcandall unto the Plaintiff, and ſo by the Rule of the Court, Judgement was entred for the Plaintif.

*An action upon the caſe for words.*

Judgement for the Plaintif.

Scot

## *Scott* Plaintiffe, againſt *Scott* Defendant.

An Action of Debt for not performance of an award.

IN an Action of Debt upon a Bond, conditioned, for the performance of an award, and for the making of the Arbitrement, and award in in writing, under hand and ſeale, indented, and the ſame to be delivered before ſuch a day, in an Action of Debt brought for breach of this, in not performing of the award, the Defendant pleads Nullum tale fecit arbitrium, afterwards it was found, that the Arbitrement was under his ſeale, but not under his hand, and by the expreſſe words of the Condition, the ſame ought to be in writing, under his hand, and ſeale, and alſo delivered. Williams Juſtice, the award ought to be alſo ſubſcribed by him. Yelverton and Croke Juſtices, agreed in opinion with him, that his hand ought to be ſubſcribed unto the award in purſuance, and according unto the very expreſſe words of the condition, that the ſame to be by writing indented, and under his hand and ſeale, and ſo to be delivered, his own hand ought to be ſubſcribed thereunto clearely by the Court. Croke and Yelverton Juſtices, if it be ſo, that he cannot write his name, he ought then for to ſet his mark unto the award, and in this the whole Court agreed, and ſo by the opinion of the whole Court, the plea of the Defendant ſtands good, and this omiſſion of the ſubſcription, to the award, judgement was given for the Defendant, quod Querens nil capiat per billam.

Judgement given for the Defendant.

## *Baker* Plaintif againſt *Dickenſon* Defendant.

A prohibition to the Court at Yorke.

IN a Prohibition to the Councell at Yorke, to prohibite them from holding of Pleas, in matters not there determinable by them, as in caſes of Replevin, and and Avowries, upon the ſame the Court cleere of opinion, that they could not there hold plea of a Replevin, nor of an avowry, theſe being determinable by the Common Law, for that an avowry is to try the Right and Title of the Rent-ſervice, and the right to a Heriot, theſe are to be determined by the Common Law, and not by the Councell of Yorke, and therefore in this Caſe, a prohibition was granted by the Rule of the Court.

## *Maynarde* and his Wife plaintiffs againſt *Towe* Defendant.

An action of Treſpaſſe.

IN an Action of Treſpaſſe Quare clauſum fregit brought by the Husband, and Wife, upon not guilty pleaded, a Verdict was found for the Plaintiffs, it was moved in arreſt of Judgement, that the Declaration was not good, becauſe he hath joyned his Wife with him in this Action, whereas the ſame ought to have been brought by him in his own name, where the Husband and Wife ſhall joyn in Actions, and where not, divers Caſes were cited, the Books are many, and the reaſons different. In this principall Caſe it was urged, that the Declaration is good, and that they ought to joyne in this Action, for it ſhall be intended that they are Joyntenants. Williams and Croke Juſtices, the Husband and Wife ſhall joyn in a Quare impedit, and ſo in treſpaſſe, the whole Court agreed with them herein. It was objected, that in this Principall caſe, being in a Treſpaſſe, Quare clauſum fregit, they ought not to joyn, but otherwiſe, if it had been in an Action of Treſpaſſe for cutting down of Trees, there they ought to joyn in the Action, but the whole Court was cleere of opinion, that this Declaration

tion here by the Husband and Wife, in this Action of Treſpaſſe, Quare clauſum fregit is good, and that they ought to joyn herein, ſo that it ſhall be taken by intendement, that they are here Joyntenants, and ſo by the Rule of the Court Judgement was entred for the Plaintif. Judgement given for the Plaintifs.

Note, that a Prohibition was prayed, and granted to the Spirituall Court to prohibite them, from proving of a Will, by the which Will, Land was devised. It was held by the Court, that the Will is entire, and cannot be divided, and the ſame will being for Land, and for goods, the ſame is to be proved here, for the whole, and not in the Spirituall Court for any part, not ſo much, as for the goods, for that this being a Will for Land, and for goods, the Land being the greater, and moſt conſiderable, ſhall draw all unto it, and ſhall make the probate of all to be here, and not in the Spirituall Court, for any part thereof, and for this reaſon a prohibition was granted by the Court. Prohibition to a ſpirituall Court in caſe of a will made of land and of goods.

## *Shepherd* Plaintif againſt Twoulſie Defendant, entred Paſch 7. Jac. B. R. Rott. 100.

IN an Action upon the caſe, for a Promiſe, upon Non aſſumpſit pleader, a ſpeciall Verdict was found, and upon the ſpeciall Verdict, the Caſe appeared to be this, the Defend. by indenture did demiſe unto the Plain. all his Tithe of Corne, and Hay, and the agreement between them was this, the Plaintiff ſhould pay him for the Tithe 55. s. and this by agreement was to be paid at a day certaine, then following, the Defendant having this Tithe, paſſed the ſame in this manner to the Plaintiff, and upon this agreement, and promiſe, being not performed, the Plaintiffe brought his Action. It was found that the Defendant confeſſed the agreement to be ſo, but in Barre, he pleaded the Statutes of 13. Eliz. cap. 20. and of 14. Eliz. cap. 11. for the avoiding of Leaſes made by a Parſon, by his abſence from his living by the ſpace of 80. dayes in one year, and alſo ſhewes that one *Stallowe*, who was the Parſon of Sharrington, to whom theſe Tithes did belong, (and in whoſe right the Defendant claimed them) was abſent from his Parſonage by the ſpace of 80. dayes in one year, and ſhewes in what year, and ſo by this his intereſt determined, and agreement with the Plaintiff, by this made void, but they found further, as the Plaintiff made it for to appeare, that Stallow the Parſon of Sharrington, was not abſent in manner, as it was alledged, for that they found, that he did dwell in another Town adjoyning, but that he came conſtantly to his Pariſh Church, and there read Divine Service, and ſo went away againe, they did alſo finde, that he had a Parſonage Houſe in Sharrington, fit for his Habitation, and whether this were an abſence within the Statutes, as to avoid his Leaſe, that they left unto the judgement of the Court. Et ſi, & Yelverton Juſtice, this is good Non reſidency within the Stat. of 21. H. 8. cap 13. but not an abſence to avoid a Leaſe made within the Statute of 13. Eliz. cap. 20. It cannot be ſaid here in this caſe, that he was abſent, for he came four dayes in every week, and in his Pariſh Church, did read Divine Service. Williams Juſtice, upon the Statutes of 13. and 14. Eliz. the Parſon ought not to be abſent from his Church 80. dayes together in one year, (a Rectoria ſua) but this is not ſo here, for he came to his Church, and read Divine ſervice there every Sunday, Wedneſday, Friday, and Saturdy, and therefore clearely this cannot be ſuch an abſence, within the ſcope and intention of theſe Statutes, as thereby to avoid his Leaſe. Yelverton Iuſtice, he ought to be abſent 80. dayes together, per ſpatium de octogin. diebus & ultra, and this to be altogether at one time, and ſo the ſame ought to have *An Action upon the caſe for a promiſe.* Statutes of 13 14. Eliz.

have been laid expreſſely, the which is not ſo done here, for that it appears here, that he was at his Parſonage houſe, and did there read prayers every Sunday, Wedneſday, Friday, and Saturday, and ſo the whole Court were cleere of opinion, that this abſence here, as the ſame appeared to be, was not ſuch an abſence by the ſpace of 80. dayes in one year, to avoid his Leaſe within the laid Statutes, and ſo the Defendants plea in Barre not good, and therefore by the Rule of the Court, judgement was entred for the Plaintiff.

## *Stowe* Plaintiffe againſt *Holland* Defendant, entred Hill. 8. Jac. B. *R.* Rott. ———

An Action of caſe for words

IN an Action of Caſe for ſlanderous words, ſpoken by the Defendant to the Plaintiff, which words were theſe (s.) Thou art a knave and a Raſcall, for thou ſetteſt upon me in the high way, and there thou tookeſt away my purſe, and my money from me, upon not guilty pleaded, a verdict was given for the Plaintiff. It was moved in arreſt of Judgement, that theſe words are not Actionable for to make words to be ſcandalous, and ſo actionable, there ought to be a ſtrong and forcible intention to make them ſo, for here he ought to have ſaid, that this was felonioufly done, which is not here ſaid, and ſo the words are not Actionable, Paſch 38, El. Davyes caſe, where the words were, being ſpoken of the Plaintif. thou haſt ſtollen by the high way ſide, theſe words held not to be actionable, becauſe he did not ſay, that it was felonioufly done. And ſo for one to ſay, Thou haſt burnt my Barn will not beare an Action, becauſe it doth not appear, that there was Corn in it, and by the Statute of 23. H. 8. cap. 1. it is not felony to burn a Barn, unleſſe there be Corn in it, and Coke 4. pa. fo. 20. ex Barhams caſe, the burning of a Barn with Corn is felony by the Common Law, and by the Statute of 23. H. 8. cap. 1. Clergie is taken away from ſuch a Felon. Fenner Juſtice, in this principall caſe, the words are Actionable, if one ſhould ſay of another, That he was laid of the pox, theſe words are Actionable, and it ſhall be intended to be the French pox. Croke Iuſtice, if the words had been, Take heed how you lodge ſuch a one, for he takes purſes, theſe words are cleerely actionable, and ſo in the principall caſe here. Yelverton Iuſtice doubted of it. Croke, Williams, & Fenner Iuſtices cleerely in this principall caſe, the words are very ſcandalous, and well actionable. Williams Iuſtice agreed with Croke Iuſtice in the caſe put by him, and ſo by the Rule of the Court, the words in this Principall caſe are actionable, and ſo judgement was entred for the Plaintiff.

Coke 4. pa. 4. 20. Barhams caſe.

Judgement entred for the Plaintif.

## *Gollew* Plaintif againſt *Bacon* Defendant.

An action of the caſe for a promiſe.

IN an Action of the Caſe upon a promiſe, the Caſe appeared to be this. The Defendant did aſſume, upon good conſideration, for to make unto the Plaintiff a good aſſurance of a Roode of Land, but performes it not: the matter queſtionable was, whether the Plaintiff (upon this non-performance, according to his promiſe) ſhall have his remedie againſt the Defendant, at the common Law, by his Action upon the Caſe, grounded upon the promiſe, or whether he ſhould goe into the Chancery, and there by his Bill, ſeek for remedy, to have performance of the promiſe. Flemming chief Iuſtice, if one doth promiſe for to give me a Horſe for 20. s. afterwards he doth not perform this. I am not in this caſe to go and ſue in Chancery for my remedie, but at the Common law, by an Action upon the Caſe for breach of promiſe, and ſo to recover Dammages, and this is the proper remedie, and the Common Law warrants only a remedy at the Common Law, and if the Law be

ſo

so in case of a House, à multo fortiori, it shall be so, in Case of a promise to make an assurance of his Land upon good consideration, and doth not performe it, he is not to sue in Chancery for this, but at the Common Law, which is most proper. CROKE JUSTICE, if I doe enter into a Bond, to one, to make him such an assurance of Land, and do not perform it, this is most proper for to be tryed at the Common Law, where the penalty may be recovered, and so in an Action upon the Case, for breach of promise, this is most proper to be tryed at the common Law, where he shall recover dammages to the value of the losse by him sustained by the not performance of his promise. Flemming chiefe Justice agreed with him herein, and Yelverton Justice of the same opinion cleerely. Flemming chiefe Justice, there are two many Causes drawn into Chancery to be relieved there, which are more fit to be determined by tryall at the Common Law, the same being the most indifferent tryall, by a Jury of twelve men.

## *William Newman* Plantif against *William Edmunds* Defendant.

An action of Trespas & Ejectment, the case upon a Will.

IN an Ejectione firme brought against the Defendant, for the tryall of the Title to certaine Lands, upon not guilty pleaded at the Tryall, upon the construction of a Will, the Case appeared to be this. A man devised Land unto William and Iohn his Sonnes, to be equally, and indifferently divided between them, and at their own proper costs and charges, the question was, what estate these two Sonnes had in the land thus to them devised, by the words and meaning of the Will. Williams Justice cleerely, they are Tenants in Common for their lives, and they have a Feesimple in one Moitie, in possession, and the reversion of the other Moitie, the whole Court agreed in this, and that the assurances were to be made at their proper costs and charges. Flemming chiefe Iustice, admit that they have a joint Estate, then the Father dyes, a discent is cast upon the eldest, the Joynture broken, the one shall make a assurance to the other, and this at their proper costs and charges, according to the meaning and true intention of the Testator, the words of the Will, are not here (equally to be divided) but the words are, to be equally, and indifferently divided between them, the whole Court agreed in this, that if a reversion doe discend upon one Joyntenant, by this the joynture is severed, and here, by operation of Law, they are now become for to be Tenants in common: but if land be given to two, and to the heires of one of them, and after the reversion discends upon one of them, this shall not sever the joynture. The Court was cleere of opinion, that in this principall case, the two Sons are Tenants in common, and the Books were cited of 34. H 6. fo. 2. 28. H. 8. Dyer 25. where a man devised lands, to his two sonnes equally, it is there left, a quere, whether they are Joyntenants, or Tenants in Common, but Coke 3. pa. fo. 39 b. in Ratcliffes case, where the Devise was of Land, in remainder, unto two daughters, and to the Heires of their two bodies begotten, equal portions to be divided, and therefore resolved, that the two Daughters were Tenants in common in taile, and that these words in a Will (equally to be divided) makes a tenancy in common, according to the intention of the Devisor, and in this principall case, the Court all agreed, that the two sonnes, by the words and meaning of the Will, were Tenants in common.

Coke 3. pa. fo 39. b. in Ratcliffs case.

Nota by the Court for a Rule, that if after a challenge taken to the Array, and two Triors are elected, and sworn, and the Jury returned, found to be indifferent, afterwards the Defendant who challenged the Array, doth challenge the Jurors, by the pole, he ought then to put in, and to shew the cause of his challenge presently, otherwise it is, where there are no Triors sworn, there he is not to shew the cause

Rules to be observed touching challenges of the Array and of other Jurors.

cauſe of his challenge, untill the other Jurors, which are not challenged, be ſworn.

Note alſo, where one doth challenge the Array, after that two Triors are elected by the Court, and ſworn to try the others, the cauſe of favour ought then to be ſhewed to the Triors, the which is called their iſſue, and after proof made of this, they are then to deliver up their anſwer to the Court, whether they do finde them to be indifferently impannelled, or not, if they do anſwer, that they are not indifferently impannelled, this is then to be entred of Record, but if they anſwer, that they are indifferently impannelled, and ſo not quaſhed, then they are to proceed to tryall, and no ſpeciall entrie is to be made of this, and ſo is the Book of 21. E. 4 fo. 59. b. where it is ſaid, by Brian, that where a challenge is taken to the Array, but two Triors, are to be elected, and ſworn to try the ſame (unleſſe it be by agreement of the parties, and there the prejgnotaries being demanded by the Court what was the courſe, they anſwered, that if the Array be quaſhed, then there is an entrie to be of the ſame upon the Record, but otherwiſe it is, if the Array be affirmed, and in neither of theſe caſes, the names of the Triors, by which the Array is affirmed, or quaſhed, are to be entred of Record, and agreeable with this, is the Book of 27 H. 8. fo. 26 a. where the Array was challenged by the Defendant, and two Tryors choſen by the Court to trie the iſſue, theſe Triors challenged the Court, nominated two other Triors, which were likewiſe challenged. Fitzherbert and the Court ſaid they would nominate two other Triors, and that they were to be allowed of, without any exception to be taken at them, the Defendant there perceiving what the Triors would doe, releaſed the challenge, and afterwards as the Jury were called, challenged to the Polls, by the Court, the Defendant is to ſhew his cauſe of challenge preſently, for when he doth releaſe the challenge, this is a good triall againſt himſelf, for by this he doth confeſſe his challenge to be falſe, and this is ſtronger againſt him, then if it had been determined by the Triors, and there by the Court, the Triors that were ſworn for to try the challenge to the Array, ſhall trie the Challenge to the polles.

21. E. 4 fo. 59. b. the Array challengd, what is to be done.

27. H. 8. fo. 26. Challenge to the Array, and to the 2. Triors twice nominated, the 3. time to ſtand.

Obſervations as touching the manner of challenges to the Array.

Note, that Man. Secundary did inform the Court, that this was the Rule conſtantly obſerved, and the manner of Entrees, in ſuch caſes, where the Array is challenged, and by the Triors the ſame quaſhed, or affirmed. And Note alſo by Man. Secundary, that where one doth challenge the Array, and concludes to the favour, he may then give kindred in evidence, but if the ſame be a principall challenge, then he ought for to make mention of the kindred ſpecially. Note alſo, that where one doth challenge the Array, this challenge ought to be read by the Councell, in French, and if he pronounce the challenge himſelf, he ought for to pronounce the ſame in French, but if he do put the ſame into the Court in writing, this ought then to be written in Latine, and ſo the ſame ought to be Recorded in Latine, but to be repeated by the Councel at the Barre in French.

Thomas Souch chief Juſtice of the Kings Bench in time of E. 1. ſlaine doing of Juſtice

Note, that Mr. David Waterhouſe, Secundary of the Crown ſide, in Court, ſaid, That Thomas Souch was chief Juſtice of the Kings Bench in the time of King E. 1. and that he was ſlaine, ſitting in the ſeat of Juſtice, (Not at Weſtminſter, but in ſome other place, where he was executing of Juſtice) and that he was ſtiled by the name of Summus juſtitiarius Angliæ.

Where the Array is challenged, and by Tryors found indifferent. Note the difference where the plaintif & the Defen. &c.

Note, where the Defendant doth challenge the Array, two Tryors are choſen by the COURT, and ſworn, and finde them indifferent, afterwards the Plaintiff challenges ſome of the Jurors by the polls, he is not to ſhew the cauſe of his challenge preſently, but to ſtay till the pannell be peruſed, and

and all the reſt ſworn, but if the Defendant do challenge by the Polle, he is to ſhew the cauſe of his challenge preſently, and ſo is the courſe and practiſe, and ſo the difference is, where the Plantiff doth challenge by the Polle, and where the Defendant after the array challenged, and by the triors found to be indifferent.

## *Hughes* Plantiff againſt Key-*miſh* Defendant Entred Trin. 7. *Jac.* B. R. Rot. 1490.

IN a ſpecial action upon the caſe, brought againſt the Defendant for the erecting of a building, in a yard, and on a void piece of ground, adjoyning unto the Plantiffs houſe, and thereby ſtopping up three of his antient lights, by which he ſaith, that he is damnified to the value of 20. l. the Defendant by way of Plea ſaith, that at the time of this building by him thus made, his dwelling houſe, was very ruinous, and in great decay, inſomuch as that he was enforced to take down one ſide of it, and upon the ſame place for to erect a new building, and further ſhewed, that the City of London eſt Antiqua Civitas, and ſets forth the cuſtome of the Citie of London to be, that where an antient houſe hath been, that there upon this old foundation by the ſaid cuſtome, he may build and ſtop the adjoyning lights of another, and ſo juſtifies, and upon this plea and juſtification, in this manner pleaded, the Plantiff demurred in Law. John Moore, for the Plantiff, that this plea and juſtification thereby is not good, and that the Plantiff hath juſt cauſe to demurre, the ſtopping up of ancient lights is a great Nuſans and damage, for that the lights are as neceſſary as the houſe. It is here objected, that this juſtification is grounded upon the cuſtome of the Citie, to build upon an ancient foundation. In anſwer unto this, the cuſtome here is not well pleaded, and this cuſtome it ſelf, as it is alleadged and ſet forth, is not good, the ſame being in it ſelf alltogether unreaſonable, for to ſtop up the lights of another, by a new building, which lights are as neceſſary as his houſe, alſo the Defendant here hath not by way of allegation ſet forth the Act of Parliament, for confirming of the cuſtomes; the Plantiff here hath ſet forth that time out of minde, theſe lights have been, and the Defendant cannot preſcribe in this, that he time out of minde hath uſed to ſtop theſe lights, alſo the cuſtome, as it is here laid, is unreaſonable, for a man cannot preſcribe to take away my inheritance, and in the book of—43. E. 3. fo 32. where an Abbot being Lord of the ville of C. ſaid that the uſages of the ville were ſuch, that when the Tenant did leſſee by 2. years, that the Lord may enter, and hold until the——Tenant do make gree with him, as touching the arrerages, and ſaid, that he who was his Tenant had ceſſed for 2. years, by force whereof he as Lord did enter, becauſe the uſage was only alleadged for to be in this ville, and in no other. It was there held by Knivet, and the whole Court, that this was an ill uſage, to ouſt a man of his heritage. It was alſo further alleadged that the Act of Parliament, for confirming of the cuſtomes of the Citie of London, is a private Act, of which the Court here is not to take any notice, unleſs the ſame be ſpecially alleadged by the partie, and ſo was it adjudged here in this Court. Trin. 29. Eliz. 2. between Bland and Moſley, cited Cook 9. Pla. fo. 26. in Aldreds caſe concerning a cuſtome laid to be in the Citie of Yorke. As to the manner of the pleading here in Barre, the ſame is not good, the Plantiff complaines here of a damage to him done by the erecting of buildings, in a yard, and upon a void piece of ground, the Defendant by plea ſaith, that he had an old Houſe, part of which was fallen down, and that there he did build the new, this is no ſufficient anſwer to the Plantiffs Declaration, nor yet to that, of which the complaint is made, being for ſtopping of his ancient lights, for if one do charge another for words

A ſpecial action upon the caſe for ſtopping of 3. lights &c.

*Object.*

*Reſp.*

An ill uſage to ouſt a man of his heritage.

Trin. 29. Eliz. B. R. Bland and Mooſlyes caſe cited Cook 9. pa. fo. 50. in Aldreds caſe.

ſpoken in Middleſex, and he pleads, and juſtifies, as to words ſpoken in Eſſex, this is not good, ſo here in this caſe, the Defendant makes no anſwer at all to the Plaintifs Declaration. Steevens agreed to the contrary for the Defendant, that the Plea and juſtification is good, a Fiſherman may preſcribe to digge the Land, and to faſten ſtakes to dry his nets, and this upon the ſoile, and Freehold of another, the reaſon is, becauſe this is for the publike good, and the other may alſo preſcribe againſt this, for to have a certaine benefit, or recompence given unto him for the ſame, this appeareth by the Books of 8. E 4. fo. 18. 19, 21. E. 4. fo. 28. 6. Brooke tit. Cuſtome pla. 51. 11. 11. H. 7. fo. 25. b. Coke 9. a pa. fo. 58. in Blaud and Moſeleyes caſe, cited in Aldreds caſe, where it is reſolved, that if one hath a lawfull eaſement or profit by preſcription, another cuſtome, which is likewiſe time out of minde, cannot take the firſt away, for that the one cuſtome is as ancient as the other, and it was reſolved in a caſe between Hammond, and Alſey Paſch. 34. Eliz. C. B. Rot. 275. that by the Cuſtome, a man may build upon an old Foundation, and ſo was the opinion of Popham chief Iuſtice. B. R. that ſuch a cuſtome was good, and ſo was it adjuged here in this principall caſe, that this cuſtome is good, but becauſe the Defendant here, in pleading of his Juſtification did not ſet forth by way of pleading, that he he did erect this his new building upon the old foundation as he ought to have done: for this cauſe, and for this omiſſion, by the opinion of the whole Court, the plea is not good, and ſo the Defendant hath failed in his juſtification, and that the Plaintiff had good cauſe for this omiſſion, to demurre in Law, and ſo by the Rule of the Court, Judgement was given for the Plaintiff.

8. E. 4. fo. 18. 19. 21. E. 4. fo. 28. Br. tit. Cuſtome Plac. 51. 11. H. 7. fo. 25.

Coke 9. a. pa. fo. 58. in Blaud, and Moſeleyes caſe, cited in Aldreds caſe.

Hammond, and Alſeyes caſe Paſch. 34. Eliz. C. B. Rot. 275.

Judgement for the plaint.

Note, that another Caſe of this nature was afterward, Mich. 10. Iac. B. R. brought by

## *Newall* Plaintiffe, againſt *Barnarde* Defendant, and entred Paſch. 10. Jac. B. R. Rott. 597.

An action upon the caſe for ſtopping up of three lights totaliter.

Juſtifies 2. by the cuſtome of London, and travers to the other.

Exceptions to the Travers.

A Speciall Action upon the Caſe was there brought by the Plaintiff againſt the Defendant, for ſtopping of three ancient lights, which had been there time out of minde, and that the Defendant had ſtopped them up totaliter ad damnum the Defendant pleads in Barre, and thereby doth confeſſe the ſtopping of two of the Lights, and part of the third, and juſtifies, and afterwards takes a Travers in this manner, abſque hoc, that he ſtopt up the three Lights, aliter, vel alio modo, and in his Juſtification he ſhews the cuſtome of London to be this, that any one may build upon an old Foundation, and upon his own land, the which he had done, and ſo juſtifies. As to this Travers, exception was taken, that this is no anſwer at all unto the Declaration. Williams Iuſtice, the Plaintiff by his Declaration hath here laid to your charge, the ſtopping of three of his lights, totaliter, and for the which he hath brought his Action, and and your Travers here as it is taken, with an abſque hoc, is no anſwer at all to this Declaration, but you ought to have anſwered, guilty, or not guilty, as to the reſidue, and ſo you ought to have pleaded, without taking of any Travers at all, for where there are three wrongs laid to be done, as in this Caſe, and the Defendant makes anſwer only unto two of them, and ſaith nothing at all to the third, this is no good anſwer, and ſo it is in this caſe here, your plea being that you have ſtopped two of the Plaintiffs lights totaliter, and this you have juſtified by the cuſtome, by building upon an old Foundation, and the third in part, with a Travers taken, abſque

hoc

hoc, quod aliter, vel alio modo, the abſque hoc here goes to the ſecond lights before mentioned, and as to the third in part, this is no anſwer at all, for that you ought to have pleaded not guilty, as to the reſidue, and not to have taken a travers, as to this, we know your meaning, by your ſaying, as to part of the third, this is no good pleading, but you ought, as to this third part to have pleaded not guilty, and therefore for this default in pleading, Iudgement was given by the Court for the Plaintif.

Judgement given for the Plaintif.

Note, by Fenner Juſtice and the Court, if a man be bound by his Bond, to ſell a Houſe unto I. S. and afterwards before any ſale by him made to I. S. he ſells the ſame houſe to I. D. that by this ſale, the Bond is cleerely forfeited, and this to be ſo, notwithſtanding that, afterwards he doth repurchaſe the ſame Houſe again.

Condition of a Bond to ſell a houſe to one, he ſels it to another, the Bond forfeited.

## *Mirrell* Plaintiffe againſt *Nicholls* Defendant. 2 Rul. 176. S. P.

NOte, that upon a triall at the Barre by a Jury of Eſſex, in an Action of Treſpaſſe, and Ejectment upon the Evidence, and upon conſtruction of a Will, the Caſe appeared to be this. Iohn Cutting being ſeiſed in Fee ſimple, of Lands in divers places (s.) of the Manor of Allens, and Rumbals, in Eſſex, and of divers other Lands alſo, in Kent, and of two ſeverall moities of Lands, by ſeverall purchaſes, the one of them in Eſſex, and the other in Kent, makes his laſt Will in writing, in manner following, (s.) Firſt, he deviſeth to his Wife, the Houſe in which he dwelt, called by the name of Allens, alias Rumballs, for the term of her life. And as to my Moities, I deviſe all my Moities in Kent, unto Thomas Beareblocke (his Sonne in Law) and under whom the Plaintiff claims) making no other mention of his Moitie in Eſſex, and he having but one Moitie in Kent, the only queſtion was, whether by theſe words (Moities) both the Moities ſhould paſſe, or not. In this Caſe, by Flemming chief Iuſtice, and Yelverton Juſtice cleerely, if one by Will doth deviſe his Land, in his own poſſeſſion, and he hath Land in his own poſſeſſion ſolely, and alſo other Land in his poſſeſſion, but in common with another by theſe words in this Will, not only the Lands in his own poſſeſſion, but alſo the Lands which he hath in poſſeſſion, and in common with another, ſhall all paſſe by this Will. If a man have Lands charged with rent, and hath other LANDS alſo, which are not charged with any a Rent, and by his Will doth demiſe theſe his lands charged, and all his other Lands charged, the Court cleere of opinion, that by theſe words in his Will, notwithſtanding, he had other Lands in Kent, beſides the Lands named before, yet by the words of this Will, he ſhall not have the other Lands, but only the Lands that were charged, and this was the opinion of the whole Court, and ſo as Flemming chiefe Iuſtice obſerved, was the opinion of all the Iudges of the C. B. and of the Lord Chancellor when he firſt heard the Caſe, being put unto him, and ſo was it cleerely held, and as to the words of the Will here, he having ſeverall Moities, one in Eſſex, the other in Kent, doth deviſe his Moities, and all his other Lands, which he had, or might have in Kent, unto Thomas Beareblocke, the queſtion was, whether this limitation of Kent, ſhall exclude Eſſex or not, the whole Court cleere of opinion, that it ſhall not: for that the ſame is all, but as one moitie, being all, purchaſed by one, (s.) by the Teſtator, and of one, and the ſame perſon, and that by the name of his Moitie, and as his Moitie, and for this reaſon, the opinion of the Court was, that this in the Will of the Deviſe of his Moities, (naming only Kent, that this Clauſe ſhall extend unto both places, both to Kent and Eſſex, and that by theſe words of both the Moities, ſhall paſſe, and ſo was the cleere opini-

Caſe upon the conſtruction of a Will.

on

Verdict and Judgement pro Querent.

on of the Court for the Title of Beareblocke, under whom the Plaintiffe claimed, and accordingly Verdict, and Judgement was given for the Plaintiffe.

## *Platt* Plaintif againſt *Sleepe* Defendant.

An action of Treſpas and ejectment.

IN an Action of Treſpaſſe and Ejectment tryed at the Barre, by a Hartfordſhire Iury, upon not guilty pleaded, and opening of the Evidence, for the Title of the Plaintiff (being an aſſignee of a leaſe for years) theſe points did ariſe. A leaſe for years made, upon a condition to be afterwards avoided by the reverſioner, upon the payment of ſix pence, the Leſſee enters by force of this Leaſe, and afterwards another enters upon him, and doth diſſeiſe him, the queſtion moved was, whether the Tender of Six pence, might now be made by the Reverſioner, for to avoid this Leaſe, after this Diſſeiſin thus had. Sir Francis Bacon Sollicitor Generall, that this tender of the ſix pence, to avoid the Leaſe, cannot now be made after the Diſſeiſin, but the whole Court of a contrary opinion, for that this paiment is a thing collaterall, and the payment of this money to avoid the Leaſe, may very well be made, notwithſtanding the Diſſeiſin upon the evidence, the Caſe appeared to go further (s.) a man having a term for years in his own right, and afterwards the reverſion of the inheritance, of a moitie thereof doth deſcend upon his Wife, the queſtion moved by Sir Francis Bacon Sollicitor generall was, whether this diſcent of the reverſion of this moitie, coming unto him in the right of his wife, ſhall extinguiſh and drown his right and intereſt in the terme, which he had in his own right or not. Sir Francis Bacon Sollicitor, that this diſcent doth drown and extinguiſh his intereſt in the terme, ſo that he can now make no diſpoſition thereof, but (the whole Court) (Williams Iuſtice only excepted) was of a contrary opinion, for that this diſcent here unto the Wife of the Huſband, being the Leſſee of the reverſion of one moitie of the Land, did come unto him in auter droite, and therefore this ſhall not drown, and extinguiſh the terme for years, which he had, and was poſſeſſed of, in his own right, but that notwithſtanding this intervenient Act of the diſcent, unto his Wife, he may yet well diſpoſe of this terme. Croke Iuſtice ſaid unto Sir Francis Bacon Sollicitor, if you had put your Caſe a little further, that the Husband, after this diſcent, had iſſue by his Wife, ſo that he was thereby intitled, to be Tenant by the courteſie, and ſo that hereby, he was to have this in his own right, this would have very much enforced the Caſe, and made it the ſtranger for you, but as to this the anſwer was made, that the Husband had no iſſue here in this caſe, and ſo no opinion was given as to this Caſe put by Croke Iuſtice, where the Husband was intitled to be Tenant by the curteſie, this was only moved, but no opinion given therein, one way or other. Williams Iuſtice, admit the firſt leaſe made by Lee to Conniſeby, was upon truſt for advancement of his Daughter, who married with him, the Husband may clearely diſpoſe of this terme, and no remedy at the common Law for it, for that he may very well by the Common Law diſpoſe of this, the whole Court agreed with him in this. Williams Iuſtice, if a leaſe for years be made to the Husband to the uſe of his Wife, the Husband may well ſell this for a good conſideration, and without all queſtion this is good, and the Wife hath no remedie for this by the Common Law. Note, as to this point of the extinguiſhment of the Terme, by the diſcent of the reverſion of a moitie of the lands unto the wife of the Termor (by the direction of the whole Court, except Williams Iuſtice) to the Iury at the Barre, that this term for years, by the diſcent of the inheritance of the reverſion, of the moitie unto the wife of the Termor, ſhall not extinguiſh the Term, and therefore no cauſe to have the Iury to find this ſpecially (though it be matter in Law) the Court having delivered their opinion therein, and ſo upon this direction the Iury gave a generall Verdict for the Plaintif; and note, that this matter being the matter in law, the Court was moved to ſtay Iudgement. Williams Iuſtice

A tender for to avoid a leaſe for years after the Leſſee is diſſeiſed and good.

ſtice, that by the diſcent of the inheritance of the reverſion of a moitie unto the Wife, the intereſt which the Husband had herein for years, in his own right, is by this diſcent extinguiſhed. Fenner, Croke Iuſtices, & Flemming chief Iuſtice, that by this diſcent, the term is not extinct, upon a motion then made, to have Judgement given according to the generall Verdict for the Plaintiffe, Williams Iuſtice oppoſed the ſame ſtrongly, that Judgement was not to be given at all, the other Judges differed from him in opinion in this, and did all of them cleerely agree, that the Judgement ought to be given for the Plaintif according to the Verdict. Flemming chief Iuſtice then ſaid unto Williams Iuſtice, you ought not now to ſpeak any thing to that which was the point in Law, thereby to hinder the giving of Judgement, after that the Jury had given a generall Verdict, (be it the one way or the other) for the Plaintif, or for the Defendant, for by their verdict ſo given, we are all of us to be concluded, and here they have given their verdict, according to our inclinations, and as they perceived our opinions to be, by declaring of the ſame to them, at the time of the triall, and as the points did ariſe, and were propounded, for our Judgements, which accordingly we then delivered, and therefore by their generall verdict, we are now all of us concluded, and we ought now to give Judgement according to the Verdict, and that without any ſuch exception to be taken, and ſo by the rule of the Court, Judgement was given accordingly for the Plaintif.

Williams Juſtice ſaid to the Counſell at the Barre, as cleere as it is that you are at the Barre, ſo cleere it is, that by this diſcent the Term is extinct. Croke Iuſtice, this is a doubtfull Caſe, but was of opinion that the Term was not extinct. Williams Juſtice did adviſe the Counſell to bring an Attaint againſt the Jury, for this their Verdict ſo given for the moity, the ſame being cleerly extinct and gone.

Judgement for the Plaintif.

## The Preſident, Fellows, and Schollars of Saint Johns Colledge in *Oxford* Plaintifs, againſt the Lord Norris *D*efendant.

IN an Action of Treſpaſſe, and Ejectment brought by Thomas Clarke Leſſee of the Colledge, againſt Thomas Hannes Defendant, who claimed under the Lord Norris his Title, this was brought for the triall of the Title of Bagley woods, or Bagley common in Rudley, the tryall at the Barre by a Barkſhire Jury, upon not guilty pleaded.

Thomas Clark Plant. againſt Thomas Hannes Defend. an *Action* of Treſpaſſe and ejectment.

Nota, that upon entring into the evidence, the Plaintiff declaring upon a leaſe to him made by the Preſident, Fellows, and Schollars of St. Johns Colledge in Oxford, by Indenture upon peruſall of the Declaration, the Plaintif declaring upon their Leaſe made unto him, for tryall of their Title, there appeared to be this omiſſion in the concluſion of the Declaration (s.) hic in Curia prolat. Williams Juſtice, this clauſe of (hic in curia prolat.) ought of neceſſitie to be in the Declaration, or elſe the ſame cannot be good, and therefore, Williams Iuſtice and the Court did adviſe the Parties to agree, to amend the Declaration in this particular, before they proceeded any further, in opening of the evidence, but notwithſtanding this adviſe they adventured to proceed without any amendment of this clauſe (which was ſo materiall, and omitted.) Williams Juſtice, cleerely, the Plaintif ought here to have ſaid in the concluſion of his Declaration (hic in curia prolat.) and that this exception is unanſwerable. Nota, that in this caſe, the Ejectment Leaſe being made by a Corporation, they ſealed the leaſe, and delivered it by their Atturney, having a letter of Atturney from them to deliver the ſame. Curia, they cannot do this in any other manner, but by their Atturney, they are only

Hic in Curia prolat. omitted in the Declaration makes the Declaration not good.

only to ſubſcribe and ſeale the Leaſe, and to deliver the ſame by their Attorney, having their Letter of Attorney ſo to do. Note, that after a long evidence—as touching the Title, and the Jury being ready at the Barre to deliver up their Verdict, the Plaintiffe being called ( and diſtruſting of the Leſſors Title ) became Nonſuit.

Plaint. nonſuit

## Sir *John* Poultney Plaintif againſt *Maſſe* Defendant.

An Action of Trover and converſion for Hay.

IN an Action of Trover and Converſion, of certain Hay, upon not guilty pleaded, the ſame was tryed at the Barre by a Jury of Middleſex, and upon the evidence the Title appeared to be for Hay, which was claimed, as in right of Coltney Chappell. Note, it was obſerved in this caſe, that the Poultneyes were Knights in the time of King E. 3. and have ſo continued untill this day in the ſame dignitie, and this was thus obſerved for the antiquitie of their name, and as to Coltney Chappell. Williams Iuſtice obſerved that the Statute of 1. E. 6. cap. 14. made for giving of Chanteries unto the King, the ſame is to be underſtood, that ſuch Chappels are thereby given to the King, which were then in eſſe, at the time of the making of the Statute, or which were in eſſe, before the Statute made, ſuch as were in eſſe, in facto, at the time of the Statute made, or which were in eſſe, in jure in right 5. years before the Law made, and this he ſaid to the Counſell, they were for to prove, or elſe they proved nothing, the whole court agreed with him herein, quod nota.

Stat. of 1. E. 6. cap. 14.

Moved in an arreſt of judgment that the ven e facias is well awarded.

Note, an exception was taken in arreſt of Judgement unto the Declaration, in an Action upon the caſe where the wrong was laid to be done, in divers places, and in three places Nominatim, the Defendant in barre pleads by way Juſtification, and fixes the ſame unto one place only, the venire facias, was taken from all the three places, the exception taken was this, that the Triall was not good, for that the venire facias was taken from all the three places, where the ſame ought to have been taken but from one. Williams Juſtice, the venire facias here was well awarded, of all the three Villes, and they all three ſhall aſſeſſe Dammages, the whole Court did agree with him in this, that the venire facias was well awarded, being of all the three Villes, that were named, and ſo by the whole Court, this exception moved in arreſt of Iudgement was was overruled, and ſo by the rule of the Court, Iudgement was entred for the Plaintif.

Judgement given for the Plaintif.

## *Thorner* Plaintiff againſt *Field* Defendant.

An action upon the caſe for a promiſe, &c.

IN an Action upon the Caſe, grounded upon a promiſe, upon Non aſſumpſit pleaded, a verdict was given for the Plaintiff. It was moved for the Defendant in arreſt of judgement, that the Declaration was not good, for want of a good conſideration therein expreſſed, and for this, the Caſe appeared to be, that the Plaintif ſold a Horſe to another for five markes, the Defendant being there preſent, did then and there ſay, that in conſideration of the ſaid ſale, (if the partie to whom the horſe was ſold by the Plaintiff) if he did not pay him for the ſame, that the Defendant did promiſe him he would ſee him paid for the ſame: upon non-paiment of this money by the Defendant, according to his promiſe, the Plaintiff brought his Action, and had a verdict for his money: the fault aſſigned in the Declaration, for to arreſt the Iudgement, was, for that it is not expreſſly laid in the Declaration, that the ſale was ſo made at the inſtance and requeſt of the Defendant, and this promiſe is alſo laid to be after the ſale of the Horſe was paſt, and perfected, and ſo

no

nogood conſideration to raiſe a promiſe. Williams Juſtice, if one happen to be in Cheap-ſide in a Mercers Shop, and there buying of Silks, Uelvets, or other commodities, and after he hath bought them, another being then there preſent, ſaith unto the Mercer, that if he do not pay you for the ſame, I will. Or if one do borrow 100. l. of another perſon, one being there preſent, ſaith unto him which did lend the money, if he do not pay you, I will: notwithſtanding all this, be ſo ſaid, yet this promiſe in law, will not charge him, unleſſe he ſaith, (and that it be ſo expreſſely laid in the Declaration) that he uſed theſe words (s.) deliver unto him, or ſuch a one, at my request, and deſire ſuch Uelvets, or ſuch a ſumme of money, or any thing elſe whatſoever, and if he do not pay you for the ſame, then I will pay you for the ſame: ſuch a PROMISE made in this manner, will well charge him, but otherwiſe not, (as in this principall caſe, the promiſe being made after the ſale of the Horſe, and the ſame not made at his inſtance and requeſt, the whole Court agreed with him herein, and that this was a good exception taken unto the Declaration, for by the opinion of the whole Court, this Aſſumpſit here, as it is laid in this Declaration, cannot charge him, it being not laid in the Declaration, that the ſale or Loane was made at his inſtance and requeſt, and that for this conſideration, he did aſſume and promiſe, that if the other did not pay him for the ſame, he would, and if the ſame were laid in this manner, then by the opinion of the whole Court cleerely he ſhall be charged by reaſon of his promiſe in this manner made, and ſo laid to be in the Declaration, but not as it is here laid in the Declaration, in this principall Caſe, and that for the reaſon before expreſſed. Croke Juſtice, if the promiſe be to pay this, as a day certaine to come, and upon requeſt, if in ſuch a caſe the promiſe be made, that if the other, at the time appointed, do not pay him, then he will, in this caſe, he ſhall be charged by reaſon of this his promiſe. Williams Iuſtice, and the whole Court, if the ſale was not made at his inſtance and requeſt, he ſhall not be charged, by reaſon of his promiſe ſo made, after the ſale paſt, and therefore in this principall caſe, according to the opinion and Rule of the Court, the entrie was, Quod querens nil capiat per billam. Judgement for the Defendant.

## *William Viccaridge*, the Brother and Heire of *John Viccaridge*, the partie killed, Plantiff againſt *John Gelſe* the Defendant and appellee.

IN an appeale, for the killing of Iohn Viccaridge his Brother. Note, that the Appellee appeared, and being at the Barre to be tried by a Jury of Glouceſterſhire, who being called, a full Jury did appeare, and one Cooke, the firſt man, coming to be ſworn, was challenged by the Appellee, for favour, becauſe he came in as a witneſſe in the Appeale, and came in by proces to be a witneſſe for the Appellant, and upon his examination in Court upon his oath, he confeſſed the ſame to be ſo, and ſo the Tryors ſworn, found him not to be indifferent, being inclinable to favour, and ſo he was for this cauſe diſcharged, the next Juror was challenged by the Appellant for that (whereas at Tewxbury, the Grand enqueſt found this fact to be but manſlaughter) this Juror ſaid, that if he ſerved of the Jury, he would not finde the ſame in any other manner, then as the Coronors enqueſt before had found it. (Note, that the party himſelf did not hear him ſay ſo, but a friend of his, upon this the Tryors found him not indifferent. Note, that the Appellee challenged the next Juror for cauſe of kindred between him and the Appellant, the which being examined upon oath he confeſſed. The Appellee challenged all the reſt of the Jurors peremptorily, and ſo there was no enqueſt to be ſworn for tryall of this appeal: Stephens at the Bar moved the Court for to have an octo tales. The Court anſwered, that in an Appeal the Appellant may have a vigint. tales, or a quadragint. tales, and upon this motion, the Court granted him a decem tales returnable in Mich. Term next enſuing. Note, by the Court, that if both parties do challenge one and the ſame Juror, and the Court ſaith—Soit treit, they cannot after this releaſe this challenge, for then it is too late to do it. An appeale of murder. Glouceſterſhire Jury at the barre for the tryall of the Priſoner: challenges to the Jurors. A Decem tales granted returnable in Mich. Terme.

## *John Hall* Plaintif againſt *Thomas King* Defendant.

An action of Treſpas & Ejectment, &c.

IN an Action of Treſpaſſe and Ejectment, upon not guilty pleaded, being tryed at the Barre by a Jury of Hampſhire, upon opening of the Declaration, the Ejectment Leaſe appeared to be ſealed 8. Maii. 7. Iac. the Ejectment laid to be 13. Maii 7. Iac. the Plantiff brings his Action in Eaſter Term following, the Plantiff failed in proving of the Ejectment. Curia, if the Plaintiff proves the ejectment at any time after the leaſe is made, and before the Action brought, this is ſufficient, as the whole Court agreed, notwithſtanding the Ejectment is here laid, at a time certaine, which he cannot prove, this is not materiall, if he can prove the ejectment at any time, before the Action brought, this is ſufficient per Curiam, but becauſe the Plantiff failed to prove this, they went no further in their evidence, but

Plaint. nonſuit

the Plantiff became Nonſuit.

A man brought by Habeas Corpus taken by a Writ de Excommunicato &c.

Note, that the Court was moved for the bailing of one who was taken by force of a Capias de excommunicato capiendo, upon the Statute of 5. Eliz. cap. 23. and came to the Barre by a Habeas Corpus. Williams Iuſtice, he which is taken by force of a Capias de excommunicato capiendo, is not bailable upon the Statute of 5. Eliz. cap. 23. the ſtatute of 5. Eliz. doth only diſpence with the forfeiture of the 10. l. and ſuch a perſon is not bailable, and as to the other matter, the ſame remaines, as it was before at the Common Law, and the Statute of 5. Eliz. diſpenſeth only with the penalty of 10. l. Yelverton Iuſtice of a contrary opinion, and that in ſuch a caſe he is bailable. Flemming chief Juſtice, this is a Caſe which doth deſerve very good conſideration, and that therefore he would conſider well of it, and alſo of the Statute of 5. Eliz before he would deliver his opinion. Williams Juſtice, clearely he is not baylable in this caſe, afterwards at another time this was moved again unto the Court to have him bailed. Yelverton Juſtice, that

Keyſers caſe.

he is bailable, and ſo was it reſolved in one Keyſers caſe, where he was taken by a Writ de excommunicato capiendo brought hither by a Habeas corpus, and upon cauſe ſhewed, he was bailed by the Court, de die, in diem, but neither the Sherif, nor any Juſtice of the Peace in the Countrey, can baile ſuch a one, but this Court here may well baile one, as in the caſe before, de die, in diem. It was further alledged here in this caſe, that in the Eccleſiaſticall Court, they would not there diſcharge ſuch a one, being taken, and impriſoned by force of ſuch a Writ, de excommunicato capiendo, without a great ſumme of money there given, and a Bond entred into for the ſame, otherwiſe no diſcharge there. Yelverton Iuſtice and the whole Court, the Biſhop ought not to take ſuch a Bond for the performance of their ſubmiſſion. The Rule of the Court here in this was, that upon their ſubmiſſion, they ſhall be abſolved, without any ſuch Bond entred into. Flemming chiefe

A man taken by a Writ de excommunicato capiendo bayled per Curiam.

Iuſtice, they ſhall abſolve them, and if they perform not according to their promiſe, and undertaking, they may then be taken again by the Writ De excommunicato capiendo, but the Biſhop is to take no Bond of them for their abſolution, to perform their ſubmiſſion, the taking of ſuch bond by them, being againſt the law, and as to the bailment, all the Judges (except Williams Iuſtice) did agree that he was bailable, and ſo by the Order and Rule of the Court, he was bailed, quod nota.

An action againſt Executors, &c.

Note, by the whole Court, as touching appearances of Defendants in the ſame terme, the Court upon ſpeciall matter ſhewed unto them, may over the Defendant for to appear, and alſo to put in his anſwer in the ſame terme (whereas by the generall courſe he may emparle, untill the next Terme, but the Court may put him by) from this, upon good cauſe ſhewed unto him, and ſo was the Rule of the Court, this Terme in a ſpeciall caſe where the ſuite was for 2000. l. againſt Executors, and for a juſt Debt, the gound of the motion to the Court was, that this being an action brought againſt Executors, that they in the interim would on purpoſe, confeſſe Actions unto others, with an intent, for to defeat the PLAINTIFFE of this his Debt, and therefore by way of

preven-

prevention, as they had appeared, by the Rule of the Court, they were alſo to anſwer the ſame Terme, in which the Plaintiff appeared, and declared againſt them, and not ſuffered in this caſe for to gaine time by an imparlance.

## *Sallowes* Plaintiff againſt *Gurling* Defendant.

IN an Action of Debt upon a Bond, upon Oyer demanded of the Bond, and of the Condition thereof, it appeared to be conditioned, for the performance of the award of four Arbitrators, mutually by them elected (with an ita quod) the ſaid award be made, and delivered in writing, and this to be of all cauſes between them, and the ſame to be made by them all, 4. 3. or by 2. of them, the Defendant pleaded that the award was void, for that but two of them made the award, and they did award matters to be done unto ſtranges, and not between the parties, and they awarded Bonds to be releaſed; the Plaintiff to the Defendants plea, The Point inſiſted upon was, whether this award thus made, be good or not, the ſubmiſſion being, with an ita quod, they four, three, or any two of them make the award, whether this be a good award here, being made but by two of them, and theſe two only ſet their hands to it, whether this be a good award made according to the ſubmiſſion, or not. It was urged for the Plaintiff, that this is a good award, and well purſuing the ſubmiſſion, if it be demanded by whom this award is to be made, to this it may be anſwered, that their power is diſtributive, to be by them four, three, or by two of them, and this all in one and the ſame ſentence, ſo it is in the caſe of a Letter of atturney to two, ſo as they both, or any one of them do it, this is as much here in this caſe, as if it had been ſaid, conjunctim & ſeparatim, this is a good recitall, and it is parcell of the condition, and it is as well here, being thus expreſſed in this manner, as if it had been ſo expreſſed in the beginning, and the Book of 2. R. 3. fo. 18. b. is upon the matter adjudged accordingly, that it ſhall be all one, as if it had been ſaid, conjunctim, & diviſim, and ſo is the Book of 22. E. 4. fo. 25- 26. & 27. Williams Iuſtice, lay all the words together, and then the award here is to be made by four, three, or two of them, and not otherwiſe. Yelverton Juſtice, the Objection made is nothing, for here, this is all but one ſentence, and this gives a good power and authoritie unto two of them for to make the award, the ita quod being that it be made by them all four, three, or by two of them, and this a very cleere caſe. Croke Juſtice, the arbitrement ſhall be intended to be made of all matters, if the others do not ſhew the contrary upon the ſubmiſſion, the Act is entire, but by the ita quod, their power and authoritie, is ſo thereby diſtributed, that the award here made by two of them is good, and purſuing the ſubmiſſion. Flemming chief Iuſtice, the Arbitrement here ought to be of all cauſes, and they have ſo done, with an exception of acquittances, or Bonds, whether this be ſufficient to make us for to underſtand this, this ought for to be ſhewed, and made appear to the Court, that ſo the Court may underſtand it, here the exception is mentioned by the parties in the award, it is impoſſible for us to underſtand it, if it be not ſhewed to us, here they had certain notice of the Acquittances, otherwiſe they could not have made this exception in their award. Alſo the ſubmiſſion is to four of all cauſes, ita quod, the award be made by them all four, three, or by two of them, and the ſame to be put in writing, the ſubmiſſion here is joynt cleerely unto four, if it had been ſo, as two of them put this into writing, this had been good enough, and by this a new authoritie is given to one, or to two, ſo as this is a condition to the precedent authoritie, not as an addition, but only as a proviſion, and this is diſtributive—So as this is a plain condition. Firſt, the ſubmiſſion here is to them all four joyntly, if there had been no more in the caſe, then it had been a joynt power, & this reference unto four gives them no power, nor authority for to intermeddle ſeverally, but joyntly, but then comes the ſubſequent cauſe of ita quod; So as the award be made by them all 4. 3. or 2 of them, this ſubſequent clauſe gives them here ſuch a joint & ſeveral power, & authority as the award

Action of Debt upon a Bond, for not performing of an award.

2 R. 3. fo. 1
22. E. 4. fo 8. b
26. 27.

here made by two of them is good, alſo the exception here in the award (of the Acquittance, or Bond) is a good award made of the ſame, and ſo the whole Court did agree in this for the Plaintiff, that the award here made by two of the named Arbitrators was well made, and purſuing the ſubmiſſion, and that their award ſo made by them, (with the exception in the ſame) was a good award, and for the not perfo mance of the ſame, the Plantiff had juſt cauſe of action, and ſo the Rule o. the Court was quod intretur judicium pro querent.

Judgement for the plantif

## The *King* againſt *Lorkin* indicted.

Exception to quaſh Lorkins Indictment for killing of one Higgins.

NOta, exception taken by Sergeant Harris to quaſh the Indictment againſt Lorkin for the killing of one Higgens, who were both of them fellow ſervants unto the Counteſſe of Dorſet, they fell out ſtanding by the fire, per ignem ſtantes, & inter ſe conſabulantes objurgabunt ſimul, & inter ſe pugnaverunt, they went preſently into the Parke, juxta knowles prædict. and there he aſſaulted him, and killed him, the exception taken was, becauſe it is not ſhewed throughout the whole Indictment, in what place, nor Countie the Parke was, where he was killed, and ſo no Countie, nor Town therein named, for the venire to be awarded from, and ſo no venire can be to try this fact. Williams Iuſtice, throughout the whole Indictment, there is no percuſſit laid in the Indictment, it is ſaid, dedit, but not percuſſit, for the word dedit will not ſerve the turn, and for this omiſſion of the word percuſſit, the indictment is not good, the whole Court agreed with him in this exception, as to the other exception taken by Serjeant Harris, to the Indictment, the Court delivered no opinion at all, but for the laſt exceptionn taken by Williams Iuſtice, the Indictment was quaſhed, by the Rule of the Court.

Indictment for want of percuſſit quaſhed per Curiam.

## *Collins* Plaintif againſt *Roe* Defendant
## entred Hill. 8. Jac. B. R.
## Rot. 109.

An action upon the caſe for a promiſe.

IN an Action upon the caſe, grounded upon a promiſe, the Plantiff in his Declaration, layeth a communication, and a promiſe thereupon by the Defendant, to procure an Indenture, and a ſurrender for not performance of the promiſe, the Action brought, and the Plantiff declares ad damnum, and the Defendant demurred to the Declaration. George Croke for cauſe of demurrer ſhewed, that the Declaration is not good. Firſt, it is therein expreſſed, that the Defendant was to procure an Indenture, and to deliver up the ſurrender, and no place ſet down, where this was. Secondly, it is laid that he was to procure ſuch a one for to ſurrender, he ſhewes that he did ſurrender, but doth not ſhew, that this was done at his own coſts, it is laid that there was a communication had between them, this is well laid, & the time, & place where this was, but then its laid further, Super quo, the promiſe was made for to doe two things, but no time, nor place ſhewed, when or where the promiſe was made, alſo it is laid, that he did promiſe to procure ſuch a one to ſurrender, it is laid that he had ſurrendred, but he doth not ſay, as he ought to do, that this was done by his meanes and procurement, for the truth was, that this was ſo done by reaſon of the Defendants payment. Henry Yelverton to the contrary, the time of the ſpeech, and communication is laid here certaine enough, and the place alſo, and the promiſe here is grounded upon the communication, and he ſheweth that he had ſurrendred accordingly, this is well laid. Williams Iuſtice, the alleadging of the day, or place here, is not materiall, it is laid that at ſuch a place and time, the communication was, this is well laid, and ſo it ought to be, but it is not requiſite to have it ſo laid, alſo in the promiſe it is ſaid, quod

poſtea

poſtea eodem die, & adtunc, & ibidem, this is well, and ſufficiently laid. Yelverton Juſtice agreed with him herein: expreſſe mention is here made in the Declaration of the promiſe, and of the communication and the agreement afterwards is depending upon this, and the ſurrender is well laid, the ſame being ſhewed to be according to the agreement, the whole Court agreed in this for the Plaintiff, that the Declaration was good, and the Defendants demurrer overruled, and by the Rule of the Court, Judgement was given for the Plaintiff. Judgement for the plaint.

## *Stubbs* Plaintiffe againſt *Flower* Defendant, entred Trin. 7. Jac. B. R. Rott. 963.

NOta, a writ of error was brought for to reverſe an Amerciament (being offered) in a Court Leet, the Error aſſigned was, becauſe the ſame was an unreaſonable amerciament. Noy, after that this amerciament is once affired, you ſhall not afterwards have a Writ of Error, and aſſigne for Error, that this amerciament was unreaſonable, and you ſhall never have a moderata miſericordia, in ſuch a caſe, the whole Court agreed clearely in this, that this is no Error now to be aſſigned, and therefore by the Rule of the Court, the ſame was affirmed. Error to reverſe an amercement in a Court Leet, &c.

ONe Vaughan did libell in the Spirituall Court of Hereford, for Tythe hay, a Prohibition was prayed, for that they did offer there for to try the validitie aſſignment of Leaſes, this being there made the queſtion, the Court demanded whether the partie had put in his ſurmiſe there, of this, and if they refuſed for to allow this, the Court would prohibit them. Williams Juſtice, and the whole Court, they are not there to meddle with the determining of any contracts, nor yet with the validitie of aſſignments of Leaſes, theſe matters belong not unto them, but to the Common Law, and therefore by the Rule of the Court, a Prohibition was granted. A prohibition granted to the Spirituall Court, &c.

## *Hooker* Plaintiffe againſt *Robinſon* Defendant.

IN a Writ of Error for to reverſe a Judgement given in an Action of Debt, the Error overruled, and Judgement affirmed. Note that in this Caſe by Croke Juſtice, and the whole Court, it was agreed that the Principall and Baile are not to joyn in a Writ of Error, but the ſame is to be brought, and ſo proſecuted ſeverally, quod nota. Principall & Baile not to joyne in a writ of error.

Note, that after the ſcire facias, to ſhew cauſe, a writ of Error was brought, and an Error in fait was aſſigned (of which they being doubtfull, moved the Court by Councell, that they now might have the favour of the Court, for to aſſign an Error in Law, the whole Court made anſwer, that they might well aſſign as many Errors in Law, as they would (but with this proviſo) that they be conteyned within the body of the Record, otherwiſe not. After a ſcire facias, an error in law aſſigned after error in fait.

## *Fuller* Plaintiff againſt *Righteous* Defendant, and entred. Mich. 8. Jac. B. R. Rott. 641.

IN a Writ of Error for to reverſe a judgement given in an inferiour Court at Lime, the Error aſſigned was in the Judgement, the ſame being (quia videbitur Curiæ, Ideo conceſſum eſt per curiam quod, whereas the ſame ought to be (Conſi- Judgement reverſed quia conceſſum for conſideratum.

(Conſideratum) this was a Judgement given in the Court at *Lynne*. Conſideratum eſt is good, but *Conceſſum eſt* is not good, and ſo was the opinion of the whole Court: and as to the Judgement in Coke a. 1. pa. in Corbets Caſe fo. 83. and in Chudleighs caſe Coke 1. pa. fo. 119. being—Ideo Conceſ. eſt quod, &c. Cur. theſe Judgements are falſe printed, and Man. Secundary informed the Court, that the Rolle was right (s.) ideo conſiderat. eſt, quod nota.

Coke 1. pa. fo. 83. in Corbets caſe, & fo 119. in Chudleighs caſe.

## *Procter* Plaintif againſt *Cliſton* Defendant entred Paſch. 8. Jac. B. R. Rott. 627.

A Writ Error to reverſe a Judgement, 1.

IN a Writ of Error to reverſe a Judgement given in C. B. in an Action upon the Caſe Sur trover & Converſion of 300. Toddas Lanæ at Coventry. The The firſt Error aſſigned was, that the Declaration was not good, (being Toddas Lanæ:) Williams Juſtice, this is no Error, for Toddas lanæ is good enough, and very ſignificant, and this is as well known, as Barellas Cervitie, and Pipas Vini for theſe, and Vocabula artis only to certifie the Court of this, and ſo the Court agreed cleerely, that Toddas lanæ is good, and that this is no Error. 2. The ſecond Error was moved, for that the converſion was laid to be apud Civitatem Coventriæ, and it is not expreſſed in the Declaration, in what place, or Countrie this is, for the awarding of the venire facias, and for this cauſe the Declaration is not good, and to this purpoſe was cited Stamford fo. 154. b. where it is ſaid, with a Nota, that in the venire facias, there ought to be theſe words (s.) De vicineto, de tiel ville, ou lieu, if it be not in caſe where the place, or ville is a Citie there (De Vicineto, to be omitted and left out, and 7. H. 6. fo. 136. b. and 4. E. 4. fo. 17. a. where it appeareth, that Wards in London are reſembled unto hundreds in the Countrey, and that a Pariſh is as a Ville, and that every Warde in a Citie, is as a ville by it ſelf, and to this effect is 8. H. 4. fo. 10. here is no Pariſh, nor place named, from whence the venire ſhould come, and for this cauſe the Declaration is not good, here in the margent is Civitas Coventriæ, the converſion is laid to be apud Civitatem Coventriæ, and the venire facias is de Civitate Coventriæ, whether this venire facias be well awarded or not, is the chief matter inſiſted upon. Geo. Croke that the venire facias here is well awarded, and ſo if it had been de vicineto Civitatis, this had been good likewiſe, and ſo was it in the caſe of Briſtow, the venire facias was de vicineto Briſtoliæ, and this held to be well awarded, where a thing iſſuable is laid for to be in a Citie, as in this Principall caſe here it is, there the venire facias is to be de Civitate. Note, that Man. Secundary, and all the Clerkes informed the Court, that the uſuall form was in this manner, the venire facias to be de vicineto, as de vicineto Weſtmonaſteriæ, and de vicineto Civitatis Coventriæ, that this is good alſo. Williams Juſtice, when the venire facias is de vicineto, this is not to be of the place where, but of the place neere adjoyning, and ſo is 7. 4. fo. 12. & 13. and a difference will be where mention is made of a Citie, which is a County in it ſelf, and where not: De vicineto Civitatis is excluſive, there it is not to be de vicineto Civitatis, but de Civitate. Flemming chief Juſtice, de vicineto, this is the Neighbourhood, not the next adjoyning, but inhabiting there. Nota, that at another time (s.) Term. Paſch. 10. Jac. B. R. this Caſe was moved again, and the chief Error inſiſted upon, was in the awarding of the venire facias, the which as it was urged, was miſawarded, the converſion being laid to be apud Civitatem Coventriæ in ſuch a Pariſh there, and the venire facias was awarded, de Civitate Coventriæ, for to try the iſſue. It was urged that this was miſawarded, for that it ought to have been de Parochia, and to warrant this, Arundels caſe Coke 6. a. pa. fo. 14. was cited where he was indicted for the murder of a Parker, and the Murder was laid for to be apud

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8. H. 4. fo. 10.

Note the difference where a Citie is a Countie in it ſelf, and where not.

Coke 6. pa. fo 5. Arundels caſe.

apud civitatem Westminst. in Comitat. Middlesex. (S) in quadam platea ibidem vocat. & in Parochia & in eodem Comitatu Middlesex. the venire facias there was awarded, De vicineto civitatis Westm. and there resolved this triall to be insufficient, and a new venire facias awarded, where it is resolved, that every triall shall be from that place, which by presumption of law, may have the best and most certain knowledge of the fact in issue, to be tried, and so is the Book of 22. E. 4. fol. 4. Fitz. tit. visne Pla. 27. Upon the difference, where an action of Trespass is brought, and the same laid for to be in one, and where in two villes, and no such ville pleaded, in the first case, the venire facias shall be awarded, out of the body of the County; in the other case it shall be awarded out of the ville; so in a Trespass, laid to be in a Manor, the venire facias shall be De Manerio, unless it be alledged to be in a ville, then the same is to be from the ville, and so a Parish is more cert. in then a Citie.

Note that afterwards (S) Termin. Mich. 10. Jac. B. R. this Case was argued again; and by Latten at the barre, exceptions were taken 1. to the Writ, that the same is not good, the same being, if such a one, fecerit te securum, &c. De quibusdam bonis, & cattallis: and this Writ is not good for the incertainty in it; for that he ought to have shewed what they are, in certain; and to warrant this exception, the book Case of 16. H. 6. Fitz. Action upon the Case Pla. 44. was cited, that the Writ ought to be certain, and to the same purpose was cited the book case of 48 E. 3. fol. 6. Brit. tit. action upon the case. Pl. 24. An action upon the case brought there against a Surgeon for undertaking of a cure, and not performing of the same, it doth not shew in the writ the place where this his undertaking was; and for this cause the writ there adjudged not to be good. It was urged also, that the Writ, ought to be as certain as the Court, and the Court here is not good, for that there is no certain place alledged for the awarding of the venire facias. It was urged, that there is variance in the Writ, Amia for Anna, also the condition is not good, the same being, ad valentiam, where it ought to be precii, upon the Lord Mounteagles Case, 3. Mariæ Dyer. Pla. 121. also the venire facias here is unawarded, Nul venire facias serra, awarded of a Hundred of a Forrest, or a Citie, being too generall. Hen. Yelverton at the Barre, that the venire facias is here misawarded, and so the Judgement is erroneous, and to be reversed. 1. as to the Writ here, the same is not good; where the Writ doth comprehend in it matter of title, there the same is not to be general but certain, the Court here doth not agree with the Writ; the Writ here ought for to set forth the goods in special, what they are, here the Action is brought for Conversion, De quibusdam bonis, this is not good, and in this case, the Declaration, is not to be with a supposall. In an Assize, the same is to be general, De libreo Tenemento, so in Trespass, Quare bona, & Cattalla, and this is good; but in this case of a Trover, and Conversion, the goods ought certainly for to be expressed, and not to be, as in this case, De quibusdam bonis, as to the venire facias, the same is misawarded, the venire facias, may well be, De civitate, &c. De vicineto Civitatis, where the same is no County, but otherwise, where the City is a County in its self. As the Citie of Norwich, which is a County in its self: and if a venire facias be in such a Case, De vicineto de Norwich, This is not good, but De viceneto Civitatis de Norwich, &c. had been good. George Crook, the Writ here is good, and ought not to comprehend all in certain, dicitur breve, quia rem breviter enarrat. Nicholls Sergeant; That the Judgement was well given, and so ought to be affirmed; That the Writ is good, notwithstanding all the exceptions taken against it: and this is here expressed according to the usual forme. As to the venire facias, which is the chief point insisted upon, the same is here well awarded, being De civitate Coventriæ, and no difference there is, where a venire facias is awarded, De vicineto, and where it is De vicineto Civitatis, as appears by the Book of Trinit. 10. E. 3. Pla. 3 in an Assize against an Infant, who pleads in bone a release of the Plaintiff made to the mother of the Infant, dated at the Citie of York,

16. H. 6. Fitz. tit. action upon the case. Pla. 44. 48. E. 3 fol. 6. Bract. tit. action upon the Case. Plea 24.

Trinit. 10. E. 3. Pla. 3. Case of York.

York, and the Witneſſes named in the deed; which deed was denyed, a Writ to the Sheriff for the Witneſſes, and the Inqueſt of the ſame ville where the Lands lay, this there tryed, per les gentes de la Citie de York; and where the awarding of a venire facias doth ſtand with reaſon and Law, there the ſame is to be maintained, and ſo it doth in this caſe. Flemming Chief Iuſtice demanded, if they had upon ſearch found out any Preſidents to warrant the awarding of this venire facias, in manner as here the ſame is; for that Preſidents ſhall direct and lead us in our Judgements herein; as to the error aſſigned, that the venire facias is not well awarded, the trover, and converſion is laid here to be apud Civitatem Coventriæ, the venire facias is awarded De civitate Coventriæ, this is well awarded Arundels Caſe Coke 6. Pa. fol. 14. before remembred, is a notable Caſe, as to this purpoſe, here it is laid to be in the Citie of Coventry, the inhabitants are the neighbourhood within themſelves, the venire facias here ought not to go to the County; the ſame is well awarded here in this caſe. As to the Writ, this is good notwithſtanding the Objections made againſt it; Amia pro Anna, this is good; for if there be once a plaine name, the predict. referres unto it; it is laid, that he was poſſeſſed, De quibuſdam bonis, at Coventry, which came to the hands of the Defendant, who there converted them; this is his title, he had goods, loſt them, & there they were converted, the Writ is good, dicitur breve, quia rem breviter enarrat, in the Court all things are certainly ſet down, the converſion, that is the chief point; if all ſhould be ſet down certainly in the Writ, it would then prove to be longum breve; The venire facias here is good every wayes, be it De vicineto, or De vicineto Civitatis, ſo that here the Writ is good, and the venire facias well awarded, and ſo the Judgement not erroneous, but was well given, and to be affirmed. And as to Preſidents being ſearched out; Man. *Secundary* now informed the Court, that upon ſearch made, he found the Preſidents to be various, ſome of them to be De civitate Coventriæ, others, *De* vicineto Civitatis, and others, De viceneto Civitatis Coventriæ, and ſuch are the Preſidents for York, Gloceſter, Briſtow, De vicineto, & De civitate Eborum; Croke Iuſtice. De vicineto is not excluſive, but incluſive. It is more proper for the venire facias to be De viceneto civitatis, then De vicineto, only where a Pariſh is laid, there the venire facias ſhall be, De Parochia, where the action is laid, the ſame is the proper place, for the venue. As to the Writ, the ſame is well, propter brevitatem dicitur breve. As to the Objection made for the matter of variance, this is nothing at all; we are not to conſtrue Logick, nor to ſpell Law. Flemming Chief Iuſtice, It appears upon ſearch made, that many Preſidents are this way, as in this Caſe, touching the awarding of the venire facias, & a via trita, we are not to ſwerve, and ſo he held the Judgement well given, and the ſame ought to be affirmed. Williams Iuſtice, as to the matter of variance, the ſame is no wayes materiall: the Clerks here do never write their Court hand with a dash, the Court-hand hath no pricks in it: There was an Action upon the Caſe brought here by *Stepney* Plaintiff, againſt Iohn Wolfe, a Verdict and Judgement againſt Iohn Wolfe predict; upon this Judgement, a Writ of Error was brought in the Exchequer Chamber, the Error aſſigned was, for that the Action was brought againſt Wolfe, and the Iudgement given againſt VVolfe predict. This was held no Error, and the Judgement there affirmed. So here you are to read this, as it ought to be with a predict. as to the Writ; the ſame is well, and as it ought to be, and therefore it is properly called breve, Quia breviter enarrat intentionem partium. And here all the whole matter is certainly ſet forth in the Declaration, and this is ſufficient. As to the Objection, being De quibuſdam bonis; this is no good objection. As to the exception taken to the Plaintiffs concluſion (being ad valentiam, whereas he ought to have ſaid precii, that is no good exception, for that the Concluſion is good both wayes, the one way and the other, and ſo is F.N.B. fol 88. H. 1. K. directly in point. As to the awarding of the venire facias in this Caſe, here is a County and a Citie, a City within the County, and both of them do make the County. Et triatio ibi fiat ubi poſſit habere notitiam rei in quæſtione optime, as Bracton obſerves, the

Coke 6 pa. 4. 14. Arundels caſe.

Stepney Plaint. againſt Woolf.

F.N B. fo. 88. H I.K.

Bracton.

Citie

Citie here is parcell of the Countie, parcell of the Corporation, the Citie was before the Countie, the Citie is a place locall, and parcell within the Countie, the venire facias is good both wayes de vicineto Civitatis, &c. or de Civitate well awarded both wayes, Venire facias de vicineto de Dale, this doth not exclude Dale. It was ſaid that Worceſter was no Citie, as to this, where ouer the Biſhop had his ſeat, this was called his Pallace, and the Town where this is ſeated ſhall be ſaid for to be a Citie, and ſo is Worceſter: the venire facias here in this caſe, was well awarded, be the ſame, the one way, or the other, the ſame is well awarded, and according to the former preſidents in point, De Civitate, de vicineto Civitatis, & de vicineto, all of them good, and well awarded, and in this the whole Court agreed that the venire facias here in this caſe was well awarded, and by the Rule of the Court the Judgement was affirmed for the Defendant in the Writ of Error.

Judgement affirmed per curiam for the Defendant.

## *Orde* Plaintiffe againſt *Moreton* Defendant, entred Mich 7. Jac. B. *R.* Rott. 539.

IN a Writ of Error for to reverſe a Judgement given at Durham, where the Judgement was there given, by force of a Commiſſion, directed unto nine, and the ſame executed by eight, it is appearing here to the Court upon certifying and removing of the Record, and then queſtioned, whether this Record were well removed or not, the record being here in Court, thus certified, it was queſtioned what the Court here ſhould do in this caſe, whether they ſhould now proceed upon this, and take it for the ſame Record, and ſo to examine the errors aſſigned; the Court were of opinion, that the beſt way would be (the Record being in Court) for the partie Plaintiff to have a new Writ of Error de Recordo quod coram vobis reſidet, and upon this Writ of Error, the Court may proceed to examine the errors upon this Record, as well as if the ſame had been well removed, and ſo this new Writ of Error is now accordingly brought, and according to the former directions of the Court, and this was aſſigned for error. Firſt, an Error en fait, becauſe he appeared by his Gardian, where he ought to have appeared by his Atturney. Secondly, the Judgement Erroneous, being given at Durham by force of a Commiſſion directed unto nine, and the ſame executed but by 8. this aſſigned for Error, for that nine contains 8. but 8. doth not contain 9. minus non continet majus. Williams Iuſtice, what Record ought they for to ſend, and certifie unto us here, that which was taken before them all nine, and not before 8. for that there was no ſuch Record. Fenner Juſtice, a Writ is directed unto three Coroners, the one of them dyes before the return, the other two may well make the return, and this hath been ſo agreed to be good. Yelverton Iuſtice, if the Writ be directed generally Coronatoribus, and not nominatim, to ſuch and ſuch, there if one dies before the returne the other which do SURVIVE, may well returne the WRIT, for they are Coroners. In caſes of authoritie, to be jointly executed before eight, ſeven of them cannot undertake to execute this, nor yet for to certifie the execution of this, by alleadging that one of them died before they could certifie, and they ought not to certifie the name of one which was dead, for that this is but a bare allegation. Nota, that afterwards this matter was moved again, Termin. Trin. 11. Jac. B. R the Error then inſiſted upon was this, the ſuite at Durham, was againſt an Infant, who appeared by an Atturney, and judgement there was given againſt him, upon this Judgement a Writ of Error was brought, and Record removed hither, in B. R. and this aſſigned for Error, that he being an Infant within age, appeared by his Atturney, whereas he ought for to have appeared by his Gardian, and being at iſſue upon this point of infancy, it was found that he was within age, this Writ of error was diſcontinued, and a new writ of Error brought, the Record being here de recordo, quod coram vobis reſidet, and the ſame error being pleaded, and a matter of fact, that 30. Iunii 6. Iac. he was within age at Weſtminſter, the other ſaid that he was then at full age, this being the iſſue between them, he was upon tryall found to be within age, and the entrie upon the Rolle was

A writ of error to reverſe a Judgement.

Error en fait quia appeared by Guardian, which he ought to have appeared by *Atturney*.

Termin. Trin. 11. Jac. B. R.

coram nobis ubicunque tunc fuerimus in Anglia apud Weſtmonaſterium &c. the firſt erroꝛ, that here was no good trial of this infancy, but that this was a miſtrial: Henry Yelverton urged, that this Court el B. R. hath no original Conuſance of this matter, and thereforꝛe they are not to meddle with it, the ſame being touching a matter done at Durham, Haughton Iuſtice, the erroꝛ en fait is found &c. we may well proceed here to give ouꝛ judgements. Goldſmith at the barre urged, that the trial here is good, the iſſue infancy at Weſtminſter, oꝛ not, the other ſaid, that at full age at Weſtminſter this the iſſue, this is a good iſſue, and well tried, and ſo was it held in 32. Eliz. in one Throgmortons caſe, that a trial at the place where infancy is alleadged to be is good. Davenport, that this was a miſtrial. Moor, the trial was ſo had by the advice and directions of the Court. It was afterwards moved again, that this was a miſtrial by Henry Yelverton, that the jury are to trie the age, where the ſtate of the land is alledged foꝛ to be, but otherwiſe it is where there is nothing elſe in queſtion, but only the age which is meerly to be tried, and this may well be tried in any place, the venire facias duodecim liberos et legales homines &c. coram nobis ubicunque tunc fuerimus in Anglia apud Weſtmonaſterium, this is not good, this venire facias is vitious, and this is not helped by any of the Statutes of Ieofayles, by which Statute want of a venire facias is aided, but not a vitious venire facias, this is not helped by any Statute Coke 9. pa. fo. 30. 6. 31. a. the caſe of the Abbot De ſtrata Marcella, where the ſeveral kindes of trials, and the manneꝛ how is mentioned, and there it is ſaid, that in a writ of erroꝛ, to reverſe a fine foꝛ nonage, oꝛ in an Audita querela to reverſe a recognizance, oꝛ Statute foꝛ nonage, in theſe caſes the age ſhall be tried by inſpection of the judges, and not per pais, the reaſon is this, becauſe that what judges of recoꝛd do as judges, the ſame is not to be tried per pais, but by inſpection of the judges, but where an infant appears by Attouꝛney, this is erroꝛ, and ſhall be tried per pais, and not by the judges, divers authorities there cited to this purpoſe, and Coke 6. pa. fo. 46, 47. Dowdales caſe, where ſeveral differences are put as touching trials, where the place is local and material, and where not. It was alſo urged here, that the age here is not matter of neceſſitie, but matter of conforꝛmitie, and like unto aſſets, which may be well alleadged to be in any place, and the like of a releas, and may be there tried where the ſame is alleadged foꝛ to be, and ſo of nonage, which may be laid and tried in any place, and ſo it was cited to be reſolved in the exchequer chamber, in a caſe there between Row Plantiff and Martin Defendant. Haughton Iuſtice, Orde is here Plantiff in a writ of error to reverſe a judgement given againſt him at Durham. Foꝛ Martin in an ejectione firme. It is a writ of erroꝛ de recordo quod coram vobis reſidet, the error in fact befoꝛe aſſigned, and now newly againe aſſigned foꝛ erroꝛ, is, that he being an infant within age did appear by his Attouꝛney, whereas he ſhould have appeared by his gardian, and foꝛ the trial of this, it was alleadged that he was at Weſtminſter Commorant, and within age there, the other ſaid that he was at full age, and this iſſue was there tried accoꝛdingly. Firſt as to the matter, the point in iſſue being infancy, this iſſue is well tried at Weſtminſter. A ſecond objection made againſt this trial, that the ſuit was in an ejectione firme, in which the realty is to be recovered, and thereforꝛe the trial of the age ought foꝛ to be where the land is, notwithſtanding this Objection, the trial of the infancy here at Weſtminſter is clearly good, and that by direct authoritie, although the ſuit at Durham was in an action concerning the realty, the ſame is to be tried where the age is alleadged foꝛ to be, alſo the age here hath no manner of dependancy at all upon the land in Durham, and thereforꝛe the difference will be this, where the age that is to be tried hath dependancy upon the land recovered, and where not &c. and ſo is the opinion of Priſot to be underſtood, in 39. H. 6. fo. 49. in an action of debt, brought upon a bond againſt I. S. Nonage averred to be in Eſſex, the trial of this was at Weſtminſter, where the

32. Eliz. 2. Throgmortons caſe.

Coke 9. pa. fo. 30. 6. et 31. a. the caſe of the Abbot de ſtrata Marcella.

Coke. 6. pa. fo. 46. 47. Dowdales caſe.

Row Plan. againſt Martin Defen.

Note the difference where the age hath dependancy on the land, and where not. Priſot.

action

action was brought the Defendant confeſſed his bond, and his entrie into it, but ſaid that he was borne in Eſſex, and within age at the time of entring into the bond, and this was tried at Weſtminſter, becauſe the nonage here had reference unto the deed (s) the bond which was confeſſed by him, but ſought to be avoided by his nonage, ſo that the difference will be where the nonage hath reference to the deed, upon which the action is brought, and where not. So where the nonage hath dependancy upon the land, there the trial ſhall be where the land is, otherwiſe not, here in this principal caſe the nonage hath no dependancy upon the land at Durham, but reſts only upon the perſon, and his being within age which is only now the iſſue, and the trial of this iſſue at Weſtminſter is good, 5. E. 4. fo. 2. an action of debt brought againſt I. S. of London yeoman in Middleſex, the Defendant ſaid that he was a Draper, and not yeoman, and demands judgement of the writ; where this ſhould be tried, was the queſtion, and by the opinion of the Court this ſhall be tried in London, and not in Middleſex where the action was brought, and here it was but in a perſonal action, and ſo it ſhould be, were it in a real. As to the venire facias, the Role is well, as to the error for the awarding of the venire facias by the Clarks- Venire facias apud Weſtmonaſterium---- ubicunque tunc fuerimus in Anglia, if Weſtminſter be out in the laſt place, (as here it is) yet this is good enough, this is only in matter of form if this be not good, & the triall had according to the veritie of the matter, this is error only in form, and therefore the ſame is well amendable, if the venire facias be de dale and the trial is at ſale, this is not good, nor yet amendable, but it is amendable here in this principal caſe, the error here aſſigned is very clear, and apparant that being within age, and appearing by Attourney, whereas he ought to have appeared by his gardian, and this being found to be ſo, the judgement for this cauſe given at Durham, is erroneous, and ſo ought for to be reverſed. Dodderidge Iuſtice, a writ of error is brought to reverſe the judgement given at Durham, the record is removed hither, the error aſſigned, that being within age he appeared by Attourney, whereas he ought to have appeared by his gardian, and being at iſſue upon the point of nonage, the ſame is found that he was within age, this writ of error was diſcontinued, and a new writ of error brought upon the record here in Court, quod coram vobis reſidet, and the ſame error here now pleaded, being an error en fait, (S) & 30. Iunii 6. Iac. he was within age at Weſtminſter, the other alleadged that he was then at full age, iſſue joyned upon this, and found that he was then within age, the Roll was for to be & Coram nobis ubicunque tunc fuerimus in Anglia apud Weſtmonaſterium, as to the firſt matter moved, whether this be a miſtrial here of the nonage, or not, that this trial was well had, and no miſtrial. As to the trials of age, (if within age) in ſome caſes the ſame is to be tried by the inſpection of the Court, without troubling of the Countrie, and there is a ſpecial writ to this purpoſe for to make him come into the Court, to be there inſpected, and this appears ſo to be by many books, and direct authorities in point as 17. E. 2. Fitz. tit accompt pla. 121, in accompt Defendant plead a deins age, and demands judgement ſi actio, he was viewed by the Court, and found to be of full age, and ſo awarded to make anſwer, according to this is the book of 25. Aſſ. pla. 2. et 48. E. 3. fo. 11. et Coke 9. pa. 4. fo. 30. in the caſe of Abbot de ſtrata Marcella, and if upon the inſpection by the Court, the judges are in doubt of the age, what is then to be done, is to be conſidered, and for that by 50. E. 3. fo. 5, 6. the Court cannot adjudge of this if it be doubtful, but then the ſame ought to come to be tried per pais, and herein the queſtion will be, as touching the place where this trial of the age ſhall be, and as to this the difference will be, where it is in a real, and where in a perſonal action, where it is in a real action and infancy pleaded, and the ſame at iſſue to be tried, this ſhall be tried where the land is, and not where the birth is alleadged for to be, and this appears to be ſo by 38. E. 3. fo. 17. 6. 18. a, et en 44. lib. Aſſ. fo. 10. 6. pla, 11. and 46. E. 3.

Touching the trial of nonage how the ſame is to be.

48. E. 3. fo. 11. Coke 9. pa. fo. 30. in the Abbot de ſtrata Marcellas caſe.

Note the difference as to the trial of nonage where in the realty or where in the perſonalty.

E. 3 fo: 6.b. 7.a & 13 11. H.4. fo: 3. & 4. 19 11. 6. fo: 51.a. If a releas be pleaded againſt I. S. of all his right, and he ſaith, that at the time of the making of the ſame releas, he was within age and borne in another countie, yet the ſame ſhall be tried where the land is; and ſo in a Nuper Obiit, or in a writ De partitione facienda between Parceners, if the one ſaith that the other is not the daughter to the other from whom the claime is, and the other doth rejoyne, and ſay that ſhe is the daughter, and born in an other Countie, yet this ſhall be tried where the land is, but otherwiſe it is in perſonall matters, for there the triall ſhall be where the writt is brought, and ſo is the book of 21. E. 3. fo:7. b. 8.a. in a writ of accompt, and 3. H. 6. fo:40. in an action of Debt upon a bond, in which for the Defendant it was pleaded, that at the time of the Sealing of the bond, he was within age, this to be tried there where the action is brought, ſo that in actions Perſonalls where Infancy is pleaded, the triall is to be, where the writ is brought, & ſo in other matters which do meerely concern the perſon of a man, here in this principall caſe the action was an Ejectione firme, where a verdict and judgement was had, a writ of error brought to reverſe the judgement, and for error aſſigned, that being within age, appeared by an Attourney, whereas he ſhould have appeared by his Gardian, the money being the matter in queſtion, and iſſuable, this to be tried where the ſame is alleadged for to be (s.) & Weſtminſter, the triall is to be where the Commorancie is alleadged for to be, ſo that this triall as it was is well had, as to the other matter, if inſiſted upon being the venire facias, 24 &c. coram nobis ubicunque tunc fuerimus, in Anglia apud Weſtmonaſterium &c. the King Bench, is where the perſon of the King is, otherwiſe it is of the Court of Common Pleas, as appeareth by the ſtatute of Magna Charta. fo. 3 cap 11. Communia placita non ſequantur Curiam noſtram, ſed teneantur in aliquo loco certo, the Rolle here is well, but the writ is not ſo, if there were no venire facias this is ayded by the Statute, but not a defective venire facias and ſo a myſtrpall followes upon this, the ſame is well amendable, and ſo divers of the ſame nature have been here amended, in the Earle of Hartfords caſe in the C.B in the roule it was De civitate weſtmonaſt. and the writ was Comitat. and this was writ with (Com.) and a daſh, and in the C. B. this was amended and made for to agree with the paper book, which was right, Civitat. and this made Comitat. &c. 2. minimes turned into an O. the venire facias there at the firſt did agree with the Role, afterwards the Role was corrupted, and yet they did there amend the roule a fortiori; here in this caſe we may amend the venire facias, there being onely in the role a default of the Clerke, and no myſtrpall following thereupon, ſo here, in this principall caſe, the errour aſſigned is an errour appazant, and for this cauſe the judgement is erroneous, and ſo the ſame ought for to be reverſed. Croke Iuſtice agreed in opinion, that the triall was good, agreed the difference well put between reall and perſonall actions, ſo that an action cannot be brought for land, but where the land is, otherwiſe it is in perſonall actions, the ſame may well be in a forraine County, as for Monage pleaded, the ſame is meerely perſonall, et ſequitur perſonam, agreed the caſes before remembered, as to the point of Inſpection, here in this caſe there is a fit, and a proper triall, if in an action the parties are at iſſue upon a demiſit, or non demiſit, this ſhall be tried where the Leaſe was made, and not where the land is, and yet this, ſub modo doth concern land. As to the writt here, the ſame ought to be amended, being but matter of forme, agreed the difference before put, where there is a miſtrpall, and where not, and alio where it is matter onely of forme, & vitium clerici, the ſame is to be amended, and ſo was it done in one Kirtons caſe in the C. B. here in this principall caſe, the Originall is well, and the triall good, and this default, being onely in matter of form, the ſame is to be amended, as to the error aſſigned for the reverſing of the Judgement, this now, appearing to the Court to be ſo, is a very clear error, and ſo the Judgement given at Durham is erroneous, and ought to be reverſed. And ſo the whole Court agreed in this, that for this Error aſſigned, and ſo now, by a Legall triall found to be ſo, the Judgement is erroneous, and ought to be reverſed, and accordingly

The Earle of Hartford-ſhires caſe in C. B.

Kirtons caſe C. B.

ingly the ſame was ſo pronounced in Court (s.) That for the Errors aſſigned, and for other errors apparant in the Record, the former Judgement given at Durham, in the Ejectione firme was reverſed, and the partie reſtored unto all, which he had loſt thereby, quod nota.

The Judgement given at Durham reverſed, &c.

Note, that the Court was moved for to have the Charter of Prince Henry filius, & primogenitus Jacobi Regis, being the Charter of his Creation, Prince of Wales to be inrolled in this. Williams Iuſtice, obſerved that the Prince eſt natus eſt Duke of Cornewall, but he is made, or created Prince of Wales, and Earle of Cheſter, and that when there was an Earl of Cheſter, Writs were then directed to the Earl of Cheſter, or Chamberlanio noſtro, and not Chamberlanio noſtro as of the King, and ſo Writts directed, Principi vel ejus locum tenenti, and ſo it appears in the Regiſter of Writs, and by the Rule of the Court, the Charter was inrolled, quod nota, and that this was ſo done according to the former preſidents upon ſearch made.

The Charter of Prince Hen. of his creation Prince of Wales inrolled by the rule of the Court.

## *Francis Holts* Caſe.

NOta, that Francis Holt was indicted for a Recuſant, and before conviction, he ſubmitted, and afterwards upon his falling back again, he was indicted againe, and ſubmitted, and indicted the third time for a relapſe.—Upon this Dodderidge, the Kings Sergeant did move for the King, to have the ſame to be certified into the Court of Exchequer for this his relaps upon the Statute of 35. Eliz. cap. 2. by which Act he is to loſe all the benefit he was to have by his former ſubmiſſion by the Act. Williams Juſtice, by the Statute it is to be ſo in caſe of Relapſe, and therefore by the Rule of the Court, this was to be certified accordingly into the Exchequer.

Nota, that this caſe was moved to the Court, Leſſee for life, remainder in fee, he in remainder cuts down Timber Trees, and ſells them, Tenant for life, being a Woman, was informed againſt for Recuſancy, the ſale of the Trees was made by the aſſent of Tenant for life, the money was brought in by the vendee into the Court of Exchequer, who ſhould have this money, was the queſtion, by the opinion of the Court, he in the remainder, cannot cut, and ſell, without the aſſent of Tenant for life, who did aſſent, the Recuſant cannot be intitled unto this Timber, but he in the remainder is to have them, the Rule of the Court was, that the money ſhould be delivered unto him in the Remainder, being the Vendor, (upon Bond by him entred into, for to repay the money, if the Court ſhould ſee cauſe, and to whom the Court ſhould appoint, but that the money ſhould not be paid out unto him, before the Wood was delivered to the Vendee, but howſoever, the opinion of the Court was Cleere in this, that the King could not be any waies intitled, to have the Timber Trees ſo cut down.

Tenant for life being an Recuſant not to be intitled to Trees cut down by him in remainder.

*Tirlot*

## *Tirlot* Plaintiffe againſt *Morris*, or *Morriſon* Defendant, entred Paſch. 9. Jac. B. R. Rott. 285. or 286.

An action upon the caſe for words, &c.

IN an Action upon the Caſe for ſcandalous words ſpoken by the Defendant of the Plaintiff, being laid to be a Merchant, the words were theſe (s.) Tirlot the Plaintif is a Bankrupt, for ſpeaking of theſe words, the Plaintiff brought his Action, and upon not guilty pleaded, a Verdict was given for the Plaintiff. It was moved in arreſt of Judgement, that the Plaintiff ought not to have this action, for that he was an Alien born, and a Merchant ſtranger, and out of the allegeance of the King, whether the Plaintiff ſhall have an Action upon the Caſe for theſe words thus ſpoken of him, was the only queſtion. Hen. Yelverton at the Bar, if theſe words had been ſpoken of an Engliſh Merchant, the words are ſcandalous, and the Action by ſuch a one well maintainable à fortiori, in the caſe of Merchants ſtrangers, for that they, by the Lawes of England, are enabled to trade here, and this is alſo to them ſtrengthened by the Statute of Magna charta cap. 30. Omnes mercatores, (niſi publice antea prohibiti fuerint habeant ſalvum, & ſecurum conductum, exire de Anglia, & venire in Angliam, & morari, & ire per Angliam, tam per terram, quam per aquam, ad emendum, vel vendendum, ſine omnibus malis, tolnetis, per antiquas, & rectas conſuetudines. Heath for the Plaintiff, that the Action is well maintenable. Coke 4. pa. fo. 26. Byrchleyes caſe which was Mich. 27. and 28. Eliz. B. R. where one ſaid of an Atturney, that he was well known to be a corrupt man, and to deale corruptly, reſolved there that theſe words were Actionable, becauſe they did diſcredit him in his profeſſion, and as to Merchants ſtrangers by the Lawes of this Realme, they are well enabled for to have perſonall actions here, but not reall actions, as appears by 6. H. 8. Dyer fo. 2 pla. 8. alſo they are aided and enabled by the Statute of magna charta cap. 30. to trade here as well as other Engliſh Merchants, and if the words had been ſpoken of an Engliſh Merchant, this had been a great diſcredit to him, and well actionable, and no difference here, and Merchants ſtrangers are within the Statutes made for Bankrupts, of 34. H. 8. cap 4. and 13. Eliz. cap. 7. for Commiſſions to be awarded to enquire of the goods Bankrupts, and of 1. Jac. cap. 15. Yelverton Juſtice, this Action here is well maintainable by the Plaintiff being a Merchant ſtranger, for calling of him Bankrupt, this Action is well maintainable by him clearely, for that an Alien Friend may well have here all Actions perſonalls whatſoever, as Actions of Debt, and the like. Williams Iuſtice to the contrary, that this Action here lyeth not by the Plaintiff, becauſe that he was alienigena, ſub ligeantia, of another, & extra ligeantiam domini regis, ſuch a Merchant Alien, may well have a perſonall action here, if the ſame be for his Merchandiſe, or for his Houſe, for that in aſmuch as the law doth ſuffer him to Merchandiſe, and to have a houſe here, the Law doth alſo enable him, and gives him power to maintain a perſonall Action for the ſame by 20. E. 4. fo. 6. pla. 6. but clearely he cannot by the Law maintain any perſonall Action, for defamation of him, by any words ſpoken of him, this is the firſt caſe that ever I heard in this kind, & it is primæ impreſſionis, & in this caſe here, I hold with Mr. Littleton in his Chapter of Villenage fo. 43. pla. 198. that it ſhall be a good Bar to the Action for to ſay that the Plaintiff was an Alien. Yelverton Iuſtice, & Croke Iuſtice to the contrary, that ſuch a Merchant Alien, may well have, and maintain ſuch an Action upon the Caſe, for words ſpoken, tending to his defamation, (as the words here ſpoken of him, in this caſe are) or he may well have an Action for an aſſault and battery upon himſelf. Flemming chiefe Iuſtice, & Fenner Juſtice at this time delivered no opinion at all, one way or other

Coke 4. pa. fo. 26. en Byrchleyes caſe Mich. 27. 28. Eliz. B. R.

Statutes of 24 H. 8. cap. 4. 13. Eliz. cap. 7. 1. Jac. cap. 15. Statutes for Bankrupts.

Littleton tit. Villenage fo. 43. pla. 198.

ther, but seemed to incline for the Plaintif, and this being moved again at another time, the Court were cleere of opinion for the Plaintiff, (all the Judges but Williams Iustice) and therefore by the Rule of the Court, Judgement was entred for the Plaintiff, quod nota.

Judgement given for the Plaintif.

## *Bowles* Plaintif against *Poore* Defendant, entred Mich. 8. Jac. B. R. Rott. 348.

IN a Writ of error for to reverse a Iudgement given in the C: B. in a Replevin, for the Avowant, wherein the cause was briefely this. A Rent was granted unto one and his heirs, Habendum to him for his life, and for the life of 3 others, what estate this should be, was the onely question. Geo. Croke for the Plaintiff in the writ of error, that this is but an estate for his own life, and that the words (his heirs) here are voide, that his own life, in the judgement of law is greater unto him than the life of any other can be, and to this purpose was cited Littleton in his chapter of Garrantia fo: 168. pla: 738. & 739 where one did binde him and his heires a garranty unto tenant for life, the which is a garranty of inheritance, but onely pur auter via, so the case there is a Lease made of land to one and his heirs, for the terme of an others life, the Lessee dyes living other, for whose life the Lease was made— the heir of the Lessee shall have the Land, during the life of the other, as a speciall occupant, so if any do grant an Annuitie to another to have and to perceive, the same, to him, and his heires, for the terme of anothers life, if the grantee dyes, after his death, his heire shall have the annuitie, during the life of the other, but this is there leall a quere, and upon this quere, comes this principall case now in question, & that upon the poynt of the Avowry, where the husband and wife Avowes for rent due before, and since the marriage, and in this Avowry, they do both of them joyne, whereas the Avowry ought to have been for that which was due before marriage to the wife, as due unto her, dum sola fuit: as to Littletons quere in the case of an Annuitie, the book of 19. E. 3. Fitz. tit. Accompt pla. 56. was cited, where by Hill, the heire shall have the Annuity, and the Arrerages incurred in the same time, and by Wilby, the heire shall have the Annuity, but not the Arrerages, saving onely for his own time. Coke 1. pa. fo. 140. b. on Chudleighs, case resolved, that an estate made to one and his heires, during the life of I. S. is but an estate for life upon which a remainder may depend by the common law, and divers books there put to proue this, and Swinnertons case cited in 8. Elyz. Dy. fo. — 253 pla. 99. where a rent was granted by fine unto F. Habendum sibi et assignatis suis during the life of Cassander, the wife of the Grantor, and if it be behind, quod bene liceret dicto Wil Fitzherbert, & heredibus suis, durante dictæ Cassandræ distringare. F. dettiseth this rent unto his wife, and dyes, Living Cassandra, this Rent was so conveyed by fine, *Sur graunt* & rendor, to the said F. the question was what shall become of this rent, whether the grantee shall retayne this as an Occupant, or whether the devisee of F. — shall have the same, there by the opinion of Dyer, the devisee— shall have it, For that by the clause of distress. F. hath in this Rent a fee simple determinable upon the death of Cassandra. 11. 11. 4. fo. 42. A Feoffement made to A. and B. and their H E I R E S, for the life of an other, the remainder over, they in the remaynder were received upon the death of the particular Tenant. 22. E. 3. fo. 19. 6. per *Shard.* if land be granted to a man, and his heires, for the life of I. S. his wife after his death shall not be endowed, by the book of 24. H. 8. Br. cases fo. 10. pla. 56. Br. tit. Forfeiture de ter pla. 87. If Tenant for life make a Feoffement to I. S. and his heires for the life of the Feoffor, this is no forfeiture, for that this is but by way of Limitation of the estate 39. E. 3. fo. 25. Land is leased to one and to his heires, for the life of the Lessor, and for one year after, an action of

A Writ of error to reverse a judgement given in the C. B.

Littletons chapter of Garranty fo. 168. pla. 178. 739.

Coke 1. pa. fo. 40. b. in Chudleighs case.

Comment 2. part fo. 556. in Walsinghams case.

waste

waste is here wel maintenable Comment. fo. 556. in Walsinghams case, where it is held, that the heir of the Lessee, (although there be a fee discendable, shall not have an Assise of Mortdauncester upon a disseisin, nor the wife of the grantee dower, and the heir shall be punished in waste, so that in effect, the heir is here but as an occupant, the principall case here was. A Rent granted to one and his heires, Habendum for his own life, and for the lives of 3 others, where an estate granted, shall be continued by way of Occupancy, and where not. No occupancy shall be of a Rent, nor yet of an estate created, by the act of law, as appeares by. 15. E. 3. Fitz. tit, Scire facias, pla. 17. if an estate be limitted unto one, for his life, and for the life of an other, these words, for the life of another, shall be voide, and the same shall be, for his own life, for that his own life is greater then the life of any other, and more deare unto him, and so is the book of 19. H. 6. fo. 22, 23. the chief error here in this case assigned, and insisted upon, was in the Avowry, and to his wife, whereas it appears, that parcell of the Rent in arrear, and for which the Avowry was made, was due unto the wife of the Avowant, before the marriage between him and his wife, so that the Avowry ought to have been for that parcell of the rent arreare, as due unto the wife of the Avowant, Dum ipsa sola fuit, and so the Avowry for this cause not good, and the judgement erroneous, and ought to be reversed. Hen. Yelverton. to the contrary, that the Avowry here was well made, and the judgement well given, and so to be affirmed, as to the error here assigned in the Avowry, the same is no error. If a lease be made to I. S. for his own life, and for the lives of two others, this hath been ruled to be a good estate, and usuall, with such a limitation. If a Rent be granted unto two joyntenants, the Rent is behinde, the one dyes, the Survivor, shall now avow in his own name for the whole, and yet this rent was behinde, in the life of the other. Yelverton Justice, If a man takes a wife, having a Rent charge, and parcell of this Rent was behinde, before the marriage, who shall have these errerages of the rent, if the husband shall not? Williams Justice, If I grant a Rent to you, and your heires for the life of. I. S. your heires shall have this rent, and this shall so be, for the avoiding, and preventing, of the gaining of an estate by Occupancy, and, so it hath been here ruled, in this principall case there is a rent behinde, unto them both, to the Avowant, and to his wife, before their marriage. The surest way for to plead this, is to say, a retro fore, dum ipsa sola fuit, but here as it is pleaded in this Avowry, the pleading, and the Avowry, as it was made by them both is good, and sufficient in Law, in as much as this whole Rent, is now due unto them both and that this is so, the same appeazs unto the Court here Iudicially, that this rent here, for which the Avowry is made, was due unto them both, and so the Judgement not erroneous, but the same was well given, and so ought to be affirmed. Croke justice, agreed the case of the Rent, before put by Williams justice, to be so, for to prevent Occupancy. If a man takes an estate for his own life, and for the life of 3 others, he shall have the benefit of all the 3 lives, to grant the same over, or to charge the same, but not for to keepe the same in his own hands, because that his own life is greater by far to him, then all the other lives are, and therefore if a lease be made to one for the life of I. S. and this is afterwards confirmed to him for his own life, this is good to him now for his own life, because that his own life is greater, but if the lease were made unto him, for his own life, and afterwards confirmed to him for the life of another, this Confirmation is meerely voide, and so if a lease be made to one for the life of I. S. sans impeachment de wast, the remaynder to him for terme of his own life, the first estate, being the lesser, is now drowned in this, and makes him now presently to be punishable in wast, and so is the book of — 28. H. 8: Dyer. fo. 10. pla. 37. and with these agrees. 5. H. 5. fo. 9. 3. E. 3. fo. 44. in Marie dela Idles case, cited Coke. 8. pla. 4. fo. 76. 6. in the Lord Staffords case, and Coke. 5. pla. fo. 13. a. in Rosses case, a lease made to one and to his assignes, Habendum, to him during his life, and the lives of 2. others, he hath an estate here of Franck tenement to continue during the 3. lives, and the survivor of them, without any

15 E. 3. Fitz. tit. Scire facias pla. 17.

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5. H. 5. fo. 9. 3. E. 3. fo. 44. Coke 8. pa. fo. 76. the Lord Staffords case, Coke 5. pa. fo. 13. Rosses case.

any drowning of the estates, this error assigned in the Avowry, is but matter of forme, so that the Avowry is good, the Judgement was well given, and not erroneous, and so the same notwithstanding the error assigned ought for to be affirmed. Flemming chief Justice, A Rent granted to one and his heires to have the same to him for his own life, and for the life of 3. others, his own life is greater then the lives of others, and shall drown the others, (where the same is so by way of present interest) but where, (as in this principall case) here it is by way of Limitation) that he shall have this, after his own life, for the lives of the others also, this kinde of Limitation, is good in Law, shall this Rent here in this case, goe back again after the death of the first grantee, and during the other lives, clearly it shall not, for there is here one, particularly limited, for to take this, and accordingly he shall have it, & his heir in this case, is not so to have the same as heire by discent but as his heir nomination, and as by way of Limitation only, and not in any other manner, he is to have it, as heir, by force and vertue of the grant, and not as by discent, but by way of limitation, and that for to prevent Occupancy. If the grant here had been limited, to be to the grantee, and to his assignes for his own life, and for the lives of three others, in such a case his assignee shal have this after his death, during the lives of the other 3. persons. In the next place as to the Avowry, here the question is, what this Rent was, at the time of the distress taken for it, and the Avowry made, and how the same became to be due, a distresse taken for the rent, a Replevin brought, and an Avowry made. If a man do marry a wife, which hath a rent (as here in this case it happened) if the wife dyes, before the husband hath recovered this, he can have no remedy, for to recover this, after the death of his wife, for that this is meerely a thing in action, & it is in the same nature, as in case of an obligation, which is made to a woman sole; who takes a husband, and dyes, living the husband he shall not have this obligation, nor any meanes now, for to recover the money due upon the same, for this is a thing in action, the benefit of which cannot be had, but as in the right of his wife, the which is now lost, by her death, here in law, and in a legall construction, all is one; be the same due before or after marriage. 7. H. 7. fo. 2. cited to this purpose Flem. demanded of the Councel pro la Pla. if they had any statute Law in this case to helpe them. Geo. Croke made answer that they had not. Flemming, the common Law is then cleerely against the Plaintiff, for the Avowry here, as it appeares by pleading, is good, and sufficient, for that the rent here in question, and for which the Avowry was made, was the same due, either before, or else after the marriage had between them, the same was due unto them both, at the time of the distress taken, and the Avowry made for the same, and so the Avowry is cleerely good, and well Pleaded, and no error in the Judgement, but the same was well given for the Avowant, and so ought to be affirmed. Williams Justice, If a feme sole doth owe me money, and takes a husband, I may very well have my action of Debt against them, and count that they owe in so much, without saying dum sola fuit, and yet this was the proper Debt of the wife, when she was sole, but now by the marriage this is made also the debt of the husband, during the Coverture, and this was one Grubbe, and Iohnsons case here so Resolved. So here in this principall case, the rent was due unto the wife, and in arrear to her, dum sola fuit, and so the same continued at the time of the marriage, and now by the marriage, the same is also made to be the rent of the husband, and the same, now (by the marriage) is due, and in arrear, to him, as well as to his wife, and so the Avowry here as it is made, by them both, is cleerely good, and the Judgement well given for the Avowants. Yelverton justice; as to the grant of the rent, this is a fee simple—determinable, Sur Lour vies, and if it had been so limited, to him, and to his assignes, for his life, and for the lives of 3. others, his assignes here after his death, shall have and enjoy the same, by force of this grant, and so if the Limitation had been to him, his heires, and assigns, for his life, and for the lives, of 3. others, if he do not assigne this over, then cleerely, his heire shall have and enjoy the same; and as to the Avowry here made for this rent, in both their names of the same, by their marriage, being now due, and in arrear for them both, the Avowry was well made, and

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7 H. 7. fo. 2.

Grubbe & Johnsons case

the Judgement not erroneous, but was well given for the Avowants, and the same Judgement ought to be affirmed. And so the whole Court did cleerly agree in this, that the Avowry was well made, being made in both their names, that the error assigned in the Judgement was no error, but the Judgement was well given in the C.B. for the Avowants, and so by the whole Court nullo Contradicente the Judgement was affirmed for the Defendant in the writ of error.

## *Vastenope* Plaintiffe, against *Tayler* Defendant, entered Hill. 8. Iac. B. R. 2. part Rot. 1337.

An Action of Trespase for a Trespas done 7 Maii, Defen. justifies a trespas done 10. Maii.

IN an Action of trespasse for breaking of his close, and eating of his grasse—and this was layd to be done the 7. day of May. the Defendant justifyes the trespas done the 10. day of May. to this justification the Plaintiffe demurred, the question was onely this, whether this justification was good, or not. Williams justice demanded whether in the conclusion of the Justification, he sayd, (which is the same trespas) Answer was made, that the pleading was so. Williams Iustice, the Justification then is cleerely good, notwithstanding, that he mislayd the time of the trespas, and so it is adjudged in 21. H. 7. fo. 39. A. 6. where the difference is put by Constable Serjeant, and agreed by the Court, if the trespas be layd to be done on a day certain, and the Defendant doth Justify the same trespas, there he needs not to conclude his—Justification, with this Averrement (s) (which is the same trespas,) but otherwise it is where he doth justifie the trespas, at another time, there he must conclude in this manner (which is the same trespas) or else the Justification is not good. Fennner & Croke Iustices, agreed with Williams Iustice herein, that the Justification here was good. Yelverton Iustice, to the contrary, the Justification here is not good, for that it cannot be any wayes intended, to be the same trespas, when as he doth Justifie for a trespas done, at an other day,—Williams Iustice, and the rest of the Judges,—against him in this, upon the difference which is taken, and ruled to be good, in 21. H. 7. fo. 3. 9. which case doth cleerely overrule this—our case in question, that the Justification here is good, and so the Court all agreed, (but Yelverton Iustice) and so the rule of the Court was—quod querens Nil capiat per billam.

Note the difference.

Judgment by the Court for the Defend.

## *Simpson* Plaintiff against *Brooke* Defendant, and entred. Mich. 8. Jac. B. R. Rott. 702.

Action upon the case for words, &c.

IN an Action upon the case for scandalous words spoken by the Defendant of the Plaintiffe, the words were these, he is not worthy to beare office in such a place, for he keepes a Bawdy house in London, upon Not-guilty pleaded a verdict was found for the Plaintiff. It was moved in Arrest of Judgement, that these words are not actionable. Yelverton Justice, these words are scandalous, and well actionable. Williams Iustice, if he sayd that he keepes an Inne, and these words spoaken of him, they will beare an action cleerely, but without alledging of this, it is doubtfull, whether they are actionable, in 27. H. 8. fo. 15, 6. it is there said by Fitzherbert, that same words are mixt, and punishable, by both Lawes, either by the common law, or in the Spirituall Court, as if one saith of an other that he keepes a house of bawdrie, the partie may choose here whether for these words he will sue him at the Common law, or question him for the same, in the Spirituall Court, the Court being afterwards moved again, as touching these words, they held the words actionable, and by the rule of the Court Judgement was given for the Plaintiffe.

Judgment given by the Court for the Plaintiff.

Shordish

## *Shordiſh* Plaintif againſt *Faldoe* Defendant entred Hill. 8. Jac. B. R. Rot. 248.

An Action of Covenant upon Articles of agreement for meaſuring of ground to be demiſed.

IN an Action of Covenant, the caſe appeared to be this, the Covenant was grounded upon certaine Articles of agreement made between the Plaintiff and the Defendant, as touching a Leaſe to be made of certaine Land by the Defendant unto the Plaintiff, at a certain Rent to be agreed upon, according to the quantitie of the Land which was to be demiſed, and that the certaintie thereof might the better appear, they entred into mutuall Covenants, each of them to the other in this manner (s.) Firſt, that there ſhould be Meaſurers by them choſen, and appointed, two by the one, and two by the other to be named, for to meaſure the ground which was to be demiſed, and if they found the ſame to be ſuch a number, and quantitie of Acres, then the Rent agreed to be paid for the ſame, was to be ſo much, according to the number of the Acres, which the Plaintiff was to pay for the ſame: the Plaintiff for breach of Covenant, in his Declaration ſets forth a breach to be made by the Defen. in hindering, and diſturbing of the meaſurers in meaſuring of a Moate, parcella præmiſſorum, &c. Geo. Croke for the Defendant took exceptions to the Declaration, that the ſame was not good. Firſt, becauſe that no time, nor place was ſpecified in the Declaration, when theſe Meaſurers ſhould be ſo appointed, nor where, nor yet when they were for to meaſure the Land. Secondly, becauſe it is expreſſed in the Declaration, that the Meaſurers, being appointed for to meaſure the Land, the Defendant did hinder and diſturbe them in the meaſuring of a Moate, parcella præmiſſorum, and doth not ſhew at all in his DECLARATION, where this Moate doth lye, and in what Town, there being two Towns and ſo no place for the venire. Thirdly, touching the manner of the diſturbance laid in the Declaration, the ſame being (quod non permitteret admeaſurare) this is not good, there being no ſence at all in theſe words of diſturbance, but he ought to have ſaid non permiſit, and then he ought to have ſhewed alſo, wherein this diſturbance was, and for all theſe cauſes, the Declaration here is not good. Davenport argued to the contrary for the Plaintiff, that the Declaration is good, notwithſtanding theſe exceptions, it is laid in the Declaration to be—quoddam ſtagnum parcella præmiſſorum, and laid to be in both the Towns, there are two Towns here, and if it be in either of the Towns, it is good enough, and if it be demanded of what place the venue ſhall be, the ſame ſhall be of both the Towns. Geo. Croke, two meaſurers are to be here appointed, and two others with them, it ought to be expreſſed at what time, in 3. E. 4. fo. 27. b. where a Leaſe for years was pleaded to be made, in pleading it ought to be ſhewed where the Leaſe was made, becauſe it may be made in another Countie, then where the Land is ſo here in this caſe, the place ought to be alleadged, the ſame being iſſuable, and it is here alſo ſhewed, that he did not ſuffer the meaſurers for to meaſure, quoddam ſtagnum, but ſhewes not in what Town this is, the ſame being iſſuable, for the venire facias. Hen. Yelverton, the venire facias here ſhall be of both the Towns. Williams Juſtice, when you lay here a breach, you ought to have ſaid in the Declaration, non permiſit, and not as it is here, non permitteret, for this is not good, but clerely the ſame ought to have been, non permiſit, alſo the Declaration is—quoddam ſtagnum parcellam præmiſſorum, this is not good, he ought to have ſhewed in the Declaration, in what Town this had been, for the more certaintie of the venue, for the venire facias here ſhall be of both the Towns. Yelverton Juſtice agreed with him herein, and that the Declaration here is not

3. E. 4. fo. 27. b.

Judgement given by the Court for the defendant quod querens Nil capiat per Billam.

good, for the exceptions before taken to the same, and because it is not shewed in the Declaration here, in what Town this was, and accordingly (as Williams Justice did observe) this was overruled by Yelverton Justice at Oxford Assises, that he ought to shew specially, in what Town this was, for the venire, and so for the exceptions before taken, the Court was cleere of opinion that the Declaration is not good, and therefore the Rule of the Court was, Quod querens nil capiat per billam.

## *Torrey* Plaintiffe against *Adey* Defendant.

1: H. 7. fo. 16. 7. 27. H. 8. Dyer. pla. 6.

IN an Action of Debt brought upon a single bill, the Defendant pleaded payment, which was found against him, and thereupon Judgement was given for the Plaintiff, and the Defendant was taken, and in execution, afterward he brings an Audita querela, and upon a single averrement of payment by him made, he was bailed, the partie Plaintiff who had the Judgement, and the Defendant in execution came and moved the Court by his Councell, to have some remedy in this Case, for that such a plea of payment, against a single Bill, is no good Plea, but against the Law, as appears by 1. H. 7. fo. 16. a. in John Doves case, and 26. H. 8. Dyer pla. 6. and the Court was also informed, that this bayment was not in open Court. Williams Justice, there was no cause here in this case sufficient for the allowing of an Audita querela, it did not lie in this case, nor ought the same to have been granted, the whole Court agreed with him herein, and so the Rule of the Court was, and by speciall direction of the Court entred, that the Audita querela was illegally granted, and therefore to be quashed, and also that the bail should be taken off & discharged, & the party Defend. being then presens in Court, was by the Rule of the Court to be then taken again in execution of the former Judgement for the Plaintiff, which accordingly was done, and an Attachment granted by the Court, against the two Atturneyes, which did prosecute this Audita querela, and the baylement for the Defendant, and also by way of prevention, for the avoiding of the like mischief again for the future, the Court did all agree in this, and accordingly caused a rule to be entred in Court. That for the future, no Audita querela should be allowed of, nor baile taken, upon any such Audita querela, but only in open Court, and not otherwise, or in any other manner, quod nota.

No audita querela, nor bayle thereupon to be taken, but in open Court.

where a feme Covert may have an action for an affault, and battery on her, in her own name, living her husband.

Note, by Williams Justice, and by the whole Court, that if a Feme Covert, in the absence of her husband, (he being beyond sea,) doth bring an action of trespas, for an assault and battery made upon her, and this brought by her, in her own name, and in the name of her absent husband, that this action is well brought, and her husband being beyond sea, she may well bring such an action, in her own name, and without her HUSBAND, but she cannot be sued by another, without her husband, though he be then beyond sea, such a suit cannot be maintained, before the return of her husband, and therefore, in the case in question, the Defendants being sued by the Plaintiffe, a feme covert, in the absence of her husband being beyond sea, and they having cause of action, for divers trespasses, as against the Plaintiffe, and her husband did move the court, that the Plaintiffe might stay her suite against the Defendants, untill the returne of her husband, in regard that they cannot prosecute their suite against the Defendant, untill the returne of her husband, in regard that they cannot prosecute their sute against the Plaintiffe, before the return of her husband, they assuring themselves, that at his returne, he would agree the businesse, and therefore by the rule of the Court, the Plaintiffe had day given her, to shew cause, why she should not agree to stay her suit, untill her husband returned, but the Court could not enforce her, to stay her, unlesse she would consent thereunto, the Court being all very cleere of opinion, that she may sue in her own name, without any restraynt, in

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the absence of her husband, being beyond sea, but she is not to be sued, by any one before her husband doth returne again, quod nota.

## *Elizabeth Bradley* Plaintiffe, against *Barks* Defendant entered Mich. 8. Iac. B. R. Rott. 407.

An appeale of manslaughter: Defendant pleads a Conviction and clergy to him allowed.

IN an appeale of Manslaughter, the Defendant pleaded a former conviction before the Justices at Yorke, that he there prayed his clergy, and had the same allowed unto him, and demands Judgement of the Court, &c. and pleads over, quod feloniam, & murdrum Non culp. Whether this plea were good, or not, was the question. It was argued for the Plaintiffe, that this plea was not good, but very vitious, and that in divers respects. First, it appeareth by 2. E. 6 Brooke title appeale pla. 124. that the heire of a man killed, may as well have an appeale of Homicide of his ancestor, as of murder. It appeares by 22. E 4. fo. 19. In an appeale the Defendant pleades, the Plaintiffe ought to reply sedente Curia, and no Amendment shall be, but the same shall be Peremptory to them both, a man shall never justify, nor be suffered to pleade in the defence of murder, the plea here, is not good, because he hath joyned issue, upon the murder, whereas he was not charged with any murder, in 22. H. 6 fo. 42. In an Action brought upon the statute, for the forceable entry (the Defendant pleads) as to the entry with force, and detainer with force, Non culp. by the Judgement of the Court, this plea is not good, because he makes answer, to that thing, with which he was not charged, and with this agrees. 14. H. 6. fo. 1. and 10. E. 4. fo. 6. one is not to tayers that which is not alledged. 2. this plea here is not good, for another reason. Inasmuch, as he was not before endited, (the enditement being voide,) because the same was taken, by a Jury, which came in without any warrant at all, without any warrant of the court the Sherif did summon the Jury, De corpore Comitatus, See the old Book of Entries fo. 384. tit. Gaile delivery pl. & fo. 26. tit proces an Assise. pla. 2. where such a warrant is to the Sherif, to returne, De quolibet Hundredo 24 liberos & legales homines &c. so that here in this case there was no Jury at all upon the matter returned, because that what was done, was so done, without any warrant at all, and so by consequence there was no enditement. 1. H. 6. fo. 1. In an appeale of Rape, in Conclusion he saith secund. form. statuti, the writt was ad respondendum secund. form. statuti, this is good, but if it were, eum appellat secund. form. statuti, this had been bad, for that the statute gives no appale, but he is to answer secundum formam statuti, & so here in this case. 3. this plea here is not good, for that this is a verdict of acquitall, and therefore this is no plea. As to the Objection made against this appeale, that here is a Discontinuance of the proces, it was answered, that here was no Discontinuance at all. The Originall writ, at the day of the returne, was then adiourned unto Mense Michael. 7. Iac. and a speciall roule made of it, a Non est inventus was returned, and a Capias awarded, returnable Octab. Hillar. this Capias was faulty, being dated. 7. dayes, before the award on the roule, this is no Discontinuance, but onely a miscontinuance, which is ayded by his appeareance, where there is one writ for an other in course of proces, and he appeares upon it, this is but a miscontinuance, and for this was cited. 11. H. 7 fo. 5. a. b. and 21. H. 7. fo. 16. b. where it appeareth what shall be a Discontinuance, and what but a miscontinuance, if in the terme of Trinity proces is awarded, returnable, Quinden Hillar. This is a Discontinuance of the plea for that after a plea is Commenced, the parties ought to have day for to appeare, in every terme (s) from terme to terme, untill the plea be determined, if otherwise, it will be a discontinuance, as appeares by 21. H. 7. fo. 16. 6. every proces, which do issue forth, is onely to bring in the partie ad respondendum, and this being served, is obeyed by his appearance. b. H. 5. fo. 2.

2. E. 6. Broke tit appeale. pla 124.

22 E. 4. fo. 19.

22. H. 6. fo. 42.

14. H. 6. fo. 1

10. E. 4. fo 6.

old booke of Entries, fo: 384. tit. Gaile delivery pla. 1. & fo. 76. tit. proces in Assise pla. 2.

11. H. 7. fo. 5. 21. H. 7. fo 16.

Nota the difference between a Discontinuance & a miscontinuance of proces.

9.H.5.fo.2. fo. 2. In an appeale of Robbery, the proces was sued to the exigent, at which day, the party appealed came in gratis, and pleaded, Non culp. and he was found Non culp. and the enquest did taxe his damages to 10.l. there the party was awarded to go quit, but without his damages, the King here, hath lost a Subject, and therefore vengeance ought to be had, qui gladium accepit, gladio peribit, Sunt verba christi, in 9. H. 5. fo. 2. the party being acquitted, in the suite of the party, the proces being erroneous, the Sherif upon the exigent, having returned a Cepi Corpus, whereas it should have been Exigi fac. which is erroneous, and this appearing upon record, and he now being of the felony Legittimo modo acquitatus, whether he shall be tryed again, at the suite of the King, but it was there awarded that he should go quit, without being arraigned again, because that the Originall was good, and so is. 19. e. 3. Fitz: tit Corone pla. 444. If a man be acquitted upon his triall in an appeale, or upon an Enditement, though there be error in the proces, yet the acquittall is good, because that he was endited upon the Originall, which was good, and not upon the proces, and as to this matter of acquittall, See Coke 4. pla. fo. 45. Vauxes Case, at large, where the reason of enterfoits acquit is expressed, because the life of a man shall not be twice put in jeopardy, for one, and the same offence, here his appearance hath supplyed all the defects in the proces, and so in this case the plea is not good, the writ of appeale, and the proceedings thereupon is sufficient, and so prayed Judgement for the Plaintiffe. Hen. Yelverton to the contrary, that the plea of the Defendant is good, the role here is out of doores, it is to be considered whether the court can take notice of the Rolle, in an other terme, this cannot be done, and so it was here resolved, in the appeale, against Morgan, and if this be so, this will lay a great stroke, to the roote of this case, none of the cases that have been put by the other side, do come neere to our case here in question, saving onely the case of 9. H. 5. fo. 2 which is a very good case, and there it appeares, that an appeale is the nicest suite, that is, and a very small matter will quash the same, if the same be not freshly pursued, and therefore Stamford hath it, unde cum instanter appellat, and so every proces ought to be in an appeale, for the partie is not to wax cold in the prosecution of his suite, and every proces in an appeale, is to beare date the same day of the retorne, and if it happen to be but a day after, this will be a Discontinuance of the proces, which no appearance can helpe, otherwise it is of a miscontinuance of proces, and this appeareth by 1. H. 7. fo. 1. b. and 21. H. 7 fo. 16. b. appearance of the party will avoide defects, in the meane proces, but the same will not helpe the default of the party, as to the Adiournment alleadged, the Court cannot take any notice of this, you have come too short here 7. dayes, all this time you haue Slept, without issuing out of any processe at all, so that here he did not appeale him, instanter, it being 7. dayes after, before any proces taken out, and there was no adiournment, in this record, neither ought the proces, to be taken out so soone when there was no court sitting. An appeale doth vary from all other proceedings, for there shall be no amendment of the writ of appeale, and if there be false Latine in it, the same shall not be amended, and this appeares to be so by 13. E. 3. Fitz. tit. Corone pla. 121. where a writ of appeale was abated, because that these words (s) (habeas hic) were not in the writ, and the party was awarded to prison, and there Note that he was not arraigned, at the suite of the King, although the court was well appaised of the peace and day, the reason of this there given was, that the court had no warrant so to do, when the writ was vitious, and the court would not suffer the writ, for to be amended, and the reason of this is, because an appeale, is the violent pursuing of a Subject unto death, and therefore the same is to be taken strictly, and that in all respects, in favorem vitæ, here in this principall case, there is a fayler, in every proces, upon this writ of appeale, for no proces is here in this case taken forth, as the same ought for to be, so that the Plaintiffs suit here is lost, and that for the want of due and good persecution. It hath been said, that here the enditement was void, and the verdict void, as to this, though the same be insufficient, as against the King, yet between common persons, the same remaynes in force, untill it be avoided, and so all here remaynes good, till the same be reversed, so that the exceptions before taken unto the plea,

Coke 4.pa.fo. 45. Vauxes case.

Stamforde.

1.H.7.fo.16.b
21.H.7.fo.16

Mich.13.E.3. Fitz.tit.Corone pla.121.

plea, do fall to the ground, and are no wayes at all materiall, he was not here endicted of murder, but of manſlaughter, and for doing of the ſame ſoodenly, purpoſely thereby to deprive him of the benefit of the ſtatute of 3. Jac. of the pardon, here he pleades over, as to the felony, Non culp. this is not of neceſſity, ſo to be done, in an appeale, but he hath pleaded ſo here, the ancient learning of appeales is, and upon this difference, where he ſhall anſwer over to the felony, and where not, where he pleads in diſabilitie of the party Plain. for to have the appeal, he ſhall not there anſw. over to the felony, but otherwiſe it is where he pleads matter in barre of the appeale, as a relcas &c. & this appears to be ſo by the books of 7. E 4 fo 15. a & 14 E 4. fo. 7 a It is cleere alſo that an appeal doth as well lie for manſlaughter, as for murder, and ſo is the Book of 2. E. 6. Brooke title Appeale pla. 124 direct in point, alſo he ought not of neceſſitie here to have anſwered—over to the felonie, as appears by the Book of 7. E. 4. fo. 15. a. his plea here as to the murder is void, if he had anſwered, and pleaded over, ad feloniam prædictam, this had been a good plea, and the Plaintif ought alſo to have ſaid—& prædictus querens ſimiliter, but this the Plaintiff here hath omitted, and not joyned upon iſſue with him herein, and therefore this is a cleere Diſcontinuance of the proceedings, on the part of the Plaintiffe, and therefore prayed that the Plaintiffe, may be barred of his appeale. Geo. Croke. for the Defendant alſo, that the plea is good, notwithſtanding the exceptions taken againſt the ſame. Firſt he pleades the enditement before the Commiſſioners at York, as before, &c. and alſo that the Venire Facias was of 2. townes, whereas the ſame, ought to have been, but of one, this is not boide, but erroneous. 2. becauſe it is contra formam ſtatuti, this is good, and ſo ought to be, if he will take from him the benefit of the ſtatute, the enditement conſiſts of 2. parts (s) 1. that he killed him, 2. that he killed him voluntarily, and againſt the ſtatute, and the Jury by their verdict, found him guilty, according to the enditement, of killing of him, at the common Law, but Non culp. contra formam ſtatuti, all this by his plea he ſets forth, and pleades over, as before, ſo that his plea is good, and ſo prayed Judgement for the defendant, the whole Court, (except Williams Iuſtice,) agreed in this, that they were not to ſearch for any other record, then this, which appeares in the pleading. Williams Iuſtice, in many caſes, we may take notice of an adjournement, the whole Court agreed with him herein, but not to ſeeke out a role, nor to ſearch out what was done upon a former role before, the ſame being no parcell, of the record now in Court, not yet once mentioned in the Declaration. Williams Iuſtice to the Plaintiffe, you ought to have ſhewed the matter your ſelf, for you can never helpe a Diſcontinuance, you ought to have ſaid this in your Declaration, and then we could have taken notice of it, but otherwiſe not; the Court agreed in this, that the Plaintiffe ought to have helped her ſelf here by an averment, and then the Court might have ſearched for the Records. Flemming chief Iuſtice every Diſcontinuance of proces, doth cleerely abate the Originall, but ſo doth not a miſcontinuance, and this is the difference, and if the Originall be once abated, how can we then any wayes help you, in your further proceedings, when as your Originall is actually abated? Williams Iuſtice, the appearance of the defendant, will well helpe and ſalve a miſcontinuance of proces, but there is no caſe in the law, to prove, that any appearance will helpe, and ſalve a Diſcontinuance of proceſs. Flemming chief Iuſtice, agreed with him herein, the very ſame day, that one proces was determined, the party ought preſently for to take forth a new proces, and the ſame to be dated, on that very day, as the other was determined, and that without any interim, for if there be one day between the ſame, that the new proces be taken forth, but one day after the former was determined, this will make a cleere Diſcontinuance of the whole, for that this is not then, as the ſame ought to be, for that the proſecution is not then, recenter & inſtanter, as it ought to be. Croke Iuſtice, the appeale ought to be purſued. de die, in diem, & de hora in horam, the whole Court agreed cleerely in this, that no appearance will helpe, and ſalve a Diſcontinuance of proces, but yet they gave time to the Plaintiffe, for to ſearch for Preſidents herein, though the Court was cleere of opinion

Note the difference where the Defend. in an appeale ſhall plead over to the felony, and where not. 7. E. 4. fo. 15. a. 14 E. 4. fo. 7. a.

Note the difference between a diſcontinnance, and a miſcontinuence.

nion, that no Presidents could be found, to make this good. Croke Iustice, the word murdravit in the endictement, may well stand for manslaughter. Williams Iustice, If the endictment is murdrum, and doth not therein mention this to be ex malitia Sua precogitata, this shall be taken onely for manslaughter, and so hath it been ruled divers times, and so is 1. Mariæ Dyer fo. 99. pla. 63.——Yelverton Iustice, the endictment is not good here, to take away from him the benefit of Clergie, but the verdict, as it was given, did enable him for to have his clergie. Flemming chiefe Iustice. If the indictment be contra formam statuti, and the verdict findes him Non culp. according to the endictment, grounded upon the statute, to take away his clergy, yet cleerely the partie may well have an appeale, and in the appeale, the Defendant shall have a double plea, the one a plea in barre, to the Plaintiffe, in the appeale, and the other a plea in barre, to the King.

1. Marie Dyer fo. 99. pla. 63.

Williams Iustice, if one kill another, and of this he is indicted before us, and the indictment is quod murdravit, we may cleerely proceed for to arraign him. Flemming chiefe Iustice agreed with him herein, the whole Court was cleere of opinion, that in this case there was a Discontinuance of the Process, in the proceedings of the on the Plaintiffs part, which can no wayes be aided, and that no amendment, is ever to be allowed in case of an appeale, and so the Judgement of the Court was cleerely for the Defendant, and against the Plaintiff, for the quashing of the Appeale, and accordingly the Rule of the Court was entred, that the Writ of Appeale should be quashed, and abate, and the Defendant discharged, quod nota.

## *John Basepole* Plaintiffe against *William Freeman* Defendant, entred Trinit. 8. Jac. B. R. Rott. 1222.

A Writ of error to reverse a judgement given in the C. B. in debt upon a Bond, &c.

IN a Writ of Error for to reverse a Judgement given in the C.B. in an Action of Debt upon a Bond, conditioned, and for performance of an award, the Error Assigned, and insisted upon, was upon a matter of Discontinuance, and as touching this error, the case appeared to be this, that after the matter in law, as touching the award, the entrie upon the roule was, that of this matter, Curia advisare vult, until such a terme, nay this was upon the principall poynt, and the matter in law, as touching the award, and the parties did overslip one whole terme, without moving of any thing at all therein, the question was, whether this were a Discontinuance, of all the proceedings or not, and herein the question was, whether there ought to be in such a case, the like entrie, and continuance of proces, (after that the Court hath taken the mater wholly into their hands, and consideration,) as there ought for to be in other matters. It was argued for the defendant, in the writ of error, that this should be no Discontinuance, and so no error, because that this is the act of the Court, the which shall not make a Discontinuance, in prejudice of the party, for when the Court hath taken this matter into their consideration, to advise upon the matter in Law, and so to determine the same, by this the parties themselves, are ipso facto, discharged, and have not after this, any day in Court, and without this, there can be no Discontinuance, Curia advisare vult, be it for Twenty yeeres, this entrie of it self, is a good Continuance of the matter in Court, without any other entrie at all between the parties, for that this entry, of a Curia advisare vult, is meerely the act of the Court, and the parties have now no more to do, but for to attend the judgement and Resolution of the Court herein. Yelverton Iustice, cleerely, this act of the Court is no Discontinuance. Goldesmith, for the Plaintiffe, that this a Discontinuance, and so the judgement erroneous, for as well, as by such an entry, one terme may be passed over, by a Curia advisare vult, by the same reason it may so be for a whole

yeere, and so for 7. yeeres, by such an entry, De curia advisare vult, and nothing upon this done. Geo. Croke for the Plaintiffe, that after this entrie, De Curia advisare vult, the letting slip of one whole terme, without doing any thing at all therin, is a Discontinuance of the proceedings in Court, by the booke of 46. E. 3. fo. 26. a. the law will never give liberty to one, for to let slippe a whole terme, without any proceedings, for as well as he may slip one terme, by the same reason a whole yeare, for in such cases, and upon such entries, the court still useth for to give a day for this over, and then the same is to be moved again, and so to have a rule from day to day, untill Judgement be given, and not to pretermit any one whole terme, without a motion made to the Court for to deliver their opinions in the cause, or to have an other day by the Court appointed for the same——— Williams Iustice, In the old booke of Entries tit. error per Discontinuance fo. 293. pla. 3. where it appeares, that such an entrie, De curia advisare vult, may be from terme to terme, and if they let slip, such an entrie, in any one terme, this is a cleare Discontinuance, Geo. Croke upon such an entrie, De curia advisare vult, they ought for to appoynt a day certain for the same, ad audiendum Iudicium Curiæ. Note, that as to the error assigned, for the matter of Discontinuance, by letting passe a whole terme, without moving the Court for their opinions, after the entry—De Curia advisare vult being the onely act of the Court; It was clerely held by all the Court (except Williams Iustice,) that this was no Discontinuance, and so no error for to reverse the Iudgement given in the C.B but that the Iudgement there given, notwithstanding this error ought to be affirmed. As to another error assigned, being a matter in law, as touching the awarde it self, and the validity of the same, the Iudges prima facie, did something doubt of the same, and therefore they delivered no direct opinion therein, but by Yelverton Iustice, if a man doth promise for to pay unto another 20.l. at Michaelmas, and this upon good Consideration, if he payes this accordingly, he demanded of Geo. Croke being of Councell with the Plaintiffe, in the writ of error, whether this shall not be a good discharge of his promise. Geo. Croke agreed this to be a good discharge of his promise, then Yelverton Iustice demanded of him, what difference there was, between this case before put, and the case of an arbitrement, where the arbitrators do awarde him for to pay this money, so due as before, and so he was cleere of opinion, that the awarde was good, and that by this awarde the partie is discharged of his promise, this being a benefit unto him, and this was the principall case, after such a promise made for to pay 20.l. they submitted themselves to the award of, &c. who did then award him to pay the 20l. this was a good awarde, and by this awarde, the one was to have the 20.l. and the other to be thereby discharged of his promise, and so a good awarde made for both parties, and if it be expressed in the award for to be, pro, & in consideratione of the promise, then cleerly, this is a good awarde, for there, by this he is discharged of his promise, and so there is an equall benefit to both the parties, (s) the payments of the money, to the one, and to the other, that by this payment, the promise is gone, and he is cleerely of and from the same freed, and discharged: the whole Court seemed to agree with him in this, that this was a good awarde, and so the Iudgement in the. C. B. well given, and to be affirmed, but as to this, (being the matter in law) they delivered no positive opinion, (as to be bound by the same,) but inclined to be of opinion for the affirmance of the Iudgement, see more of this at large, with the reasons of the Iudgement, Coke. 8. pa. fo. 97. &, 98. Basepoles case.

Old Book of Entries title error per discontinuance fo. 293. pla. 3.

This was no discontinuance by the opinion of the Court. by all but by Williams Iustice.

Coke 8. pa. fo. 97, 98. Basepoles case.

## *Scriven* Plaintiff against *Wright* Defendant.

NOte, that a motion was made to the Court, on the behalfe of Scriven, that the Defendant being in execution, at his suite for Debt, to him due, and he having more liberty then was convenient for a prisoner to have, and that he lived at his pleasure, without any restraint, and therefore for the more speedy payment of his debt, the Court was moved to haue him kept, in arcta custodia (s) to be kept in fetters. Williams Iustice, you can never shew any such president for this. Croke Iustice, he shall never

A prisoner not to be in fetters but for criminall offences, not in case of an execution.

never be kept in fetters, but for a criminall offence, and not where he is in, upon an execution, the whole Court agreed in this cleerely, that he should not have fetters, but for criminall offences, but ordered that he should be restrayned of his liberty.

## *Foster* Plaintif against *Hill* Defendant, and entered. Hil. 8. Iac. B. R. Rott. 1199.

An action of tresPas, for breaking and entering his house, &c.

IN an action of tresPas for breaking and entring his house at 11. of the clocke at night, and taking of the Plaintiffe away, and carying of him before one Master Conniseby, a Justice of the peace, & ad damnum, and the defendant, being a Constable, doth Justify, by vertue of a warzant to him directed, from Mr. Conniseby a justice of the peace, for the taking of the Plaintiffe, and bringing of him before him, to answer, & and the onely question was—whether this Justification was good or not, Williams Iustice the warrant here is generall, the defendant she was here in this Justification, that by vertue of the warrant he came into the house, at 11. a clocke at night, and did there take him, and brought him before Mr. Conniseby a justice of peace, this is no good Justification cleerely. Geo. Croke. there was a warrant sent out by a Justice of peace to the Constable, and that he should immediately take him, that he came to his house, and bid him open the door, the which to do, he refusing, he break, open the door, and so took him away. Williams, & Fenner Iustice, he could not break open the house in the night, for any thing, but for felony. Williams Iustice, this is a most perilous example, to break a mans house in the night, by force, and by vertue of a generall warrant, also it is cleere, that a Constable cannot justify the breaking of any mans house, unlesse it be in case of felony. Flemming chief Iustice, this is the act of a Constable, this is a matter not worth the argument, being so cleere a matter, agreed cleerely, with Williams Iustice, that this Justification is not good, and that a Justice of peace ought not for to make such a warrant, as was made in this case, unlesse that the same be, in case of felony, or Treason, and he ought then, for to expresse this in his warrant, and that for the greater care to be had in the execution of such a warrant, in this case, the Constables error cannot save him harmeless, there is no doubt at all to be made of this case, it being very cleere, that this act of the Constable is no wayes warrantable and so the Justification here is not good. Yelverton Iustice, agreed with him cleerely in this, that this Justification is not good, but the Constable is lyable to be questioned, for this so unjust, and so illegall an act done by him, and his ignorance of the law, herein, will not excuse him 'and it is resolved. Coke. 5. pa. fo. 19. 6. & Semaynes case, the house of every man, is to him, as his castle, and fortresse, as well for his defence, against injury, and violence, as for his repose, and there. fo. 92. for felony, or for suspiction of felony, the officer of the King may break the house, and take the fellon: but there resolved, that the Sheriffe, upon an execution, at the suite of a Common person, cannot breake open the house of any one for to do execution, much lesse may a Constable break a mans house, and take him away, by force of an ordinary warrant from a justice of peace, and not in case of felony, nor of treason, so that this was here a meere tortious act, in the Constable, and no wayes to be justified by him, and the Plaintiffe, hereby very much wronged, and damnified, and hath just cause of action, and the Justification here, being not good, the Plaintiffe, hath good cause to recover, and so the whole Court agreed cleerely in this, that the defendants Justification here is not good, and so by the Rule of the Court Judgement was entered for the Plaintiffe.

Semaynes case.

Iudgement given for the plaintiffe.

King

## *King* and Long Plaintifs againſt *Lorking* Defendant.

IN an action upon the caſe brought for ſcandalous words, ſpoken by the Defendant, of the Plaintiffs, which words were theſe, (s) Mr. Maſter was robbed, of 40 l. and of ſo much plate, and that Long, and King have the ſame, and for which, (by God) they will be hanged; for theſe words thus ſpoken, the action was brought, and the ſame laid to be ad damnum, &c. the Defendant pleaded not guilty, a verdict given for the Plaintiffe. It was moved in arreſt of Judgement, that theſe words are not actionable. Hen. Yelverton for the Defendant, that the words are not actionable, becauſe it is not here ſo charged, that they knew of the felony, and conſented unto it. Goldſmith for the Plaintiffe, that theſe words are ſcandalous and actionable, for where the life of a man may be taken away, and words are ſpoken to this purpoſe, ſuch words ſhall be actionable, and ſo it is here in this caſe, Mich: 36. & 37. Eliz. between Ball Plaintiffe againſt Reanes Defendant. An action upon the caſe for words ſpoken of the Plaintiffe, being, He is a cunning knave, and acquainted with more cutpurſes then any man in Northamptonſhire; and there is not a purſe cut within twenty milles of Wellingburrough, but he hath his part in it, adiudged, that theſe words were actionable. Yelverton Iuſtice, if the words had been theſe—(s) ſuch, and ſuch were the goods of ſuch a one, theſe words of themſelves are not actionable, but when he ſaith further, as here in this caſe, and for that you ſhall be hanged, this implies, that they were ſtollen, and by this it ſhall be intended that he knew of it, theſe words here are actionable. Williams Juſtice, theſe words are very ſcandalous, and cleerely actionable, the latter words do here very much aggravate the matter of ſcandall. Yelverton Iuſtice, if one do ſay of another that he hath deſerved for to ſtand in the Pillory, it hath been adjudged, that theſe words are actionable. Flemming chiefe juſtice, In this caſe here in queſtion, and the words are to be layd together, for to prove his intention, and what he meant by his ſpeaking of theſe word, (s) the beginning, the middle, and the end of theſe words, here a Robbery is layd to be done, and he hath the goods, for which he will be hanged, this cannot be done, unleſſe he knew of it, without all doubt, ſuch words may touch any mans reputation, and credit, to be ſpoken of him, ſo that it is very playne, that by his uſing of theſe words, his meaning was, that he had not theſe goods honeſtly, but that he might be hanged for them, theſe words are very ſcandalous, and do import very great defamation, the fame, and reputation of a man is as precious to him as riches, nay, as his life, cleerely theſe words are actionable. Croke Juſtice agreed in opinion that the words are actionable, being ſpoken adviſedly, (as here they ſeeme for to be ſo ſpoken, they being malicious and very ſcandalous words, and ſo cleerely actionable, and ſo by the cleere opinion of Flemming chiefe Juſtice, Williams, Yelverton, & Croke Juſtices, theſe words here as they are layd in this Declaration, are very—ſcandalous and actionable. Fenner Juſtice, ſomething doubted of the words, and that the latter words, in the Concluſion did not aggravate the former words, but all the reſt of the Judges differed from him in opinion, and ſo by the rule of the Court—Judgement was entered for the Plaintiffe.

Action upon the caſe for words, &c.

Mich. 36. & 37. Eliz. Ball Plaint. againſt Reanes. action on the caſe for words.

Judgment given by the Court for the Plaintiff.

## *Berefoorde* Plaintif, againſt *Preſſe* Defendant.

IN an Action upon the caſe brought for ſcandalous words ſpoken by the Defend. to the Plaintiffe, as namely,—you have ſpoken words—which I thinke are Treſſon—and upon this, he went unto a Juſtice of Peace, & informed againſt him, who there-

An Action on the caſe for words, &c.

thereupon bound him over to the Assises, to answer the same, & bound the Defen. being a Minister, to prosecute, the which he did there accordingly, and the Plain. was acquitted by verdict, afterwards he brought his action upon the case against him for speaking of these words, as before, upon Non Culp. pleaded, the Jury found for the Plaintif. it was moved in arrest of judgement that these words are not actionable, Geo. Croke for the Defendant, that the words are not actionable, being too generall, the case was this, two were arguing together, the one of them said to the other, I can prove these words spoken by you, to be treason, and this was as they were so arguing together, and therefore not actionable, he said Mr. Beereford hath spoken words which are treason, the which I can prove, the words spoken were these, and upon this occasion, (s) they being speaking of the—benevolence of the King, the Plaintiffe said, I care not for the King, nor yet for his benevolence, these words spoken, and upon this occasion, and thereupon the Defendant did speak the words to the Plaintiffe, which words, lay altogether, are not actionable. Iohn Moore for the Plaintif, that the words are actionable, as touching actions upon the case for words, these two grounds may be layd, to make words actionable. First, the words must be spoken maliciously, and they are to be such words, as do tend unto the slander and defamation of the partie, of whom they are spoken, and that he may be punished by the law for them. 2. they are to be such words, as do trench to his hinderance, and discredit, and for which he might be imprisoned, if true, and to this purpose, there was a case, between Rewdam Plaintiff, and Tucker Defendant, an action of the case for words, being, Thou art a Concealer of felony, and it lyeth in my power to hang thee, these were generall words, and shewes not how, and yet they were adjudged to be actionable, and there was a case in this Court. Hill. 5. Iac. Blanch Flower Plaintif, against Atwood. An action upon a case for words, being, I will hang thee, for thou hast spoken words which are high treason, adjudged that the words were actionable, there it was moved in Arrest of Judgement, that the words were too generall, but the Court made answer, that the speaking of the words was matter of state, and therefore he ought not to utter the words precisely, adjudged actionable for that the speaking of these words is a great scandall, and there RESOLVED, that for these words, (I will hang thee, for thou hast committed felony,) an action lyeth. Hen. Yelverton for the Defendant, that the words here are not actionable, as for Blanch Flowers case cited, this doth very much differ from our case, to maintain an action upon the case for words, there ought to appeare malice, and rancour of heart, and all this appeared in Blanch Flowers case, being, I will hang you, in these words appears great malice, here in this case, one may speake treason, out of the mouth of another, and without any malice at all, and so prayed Judgement for the defendant. Williams Iustice, these are very naughty words, if a man speakes treasonable words, is not this sufficient for to make him a traytor, and sufficient to bring him within the danger of the law, these words, as here, are scandalous, and actionable, for these words, Thou art a traitour generally, no action lyeth clearely, but he adds these words, (s) and I will prove it, then they are actionable. Fenner Iustice agreed that these words are actionable. Croke Justice, if there be a peremptory accusation, and that he will prove it, these words will be actionable, but if it be onely a Caveat, and forewarning by these words spoken, (s) as I doubt of these words, and that he would goe, and enquire whether these words were treason; words thus spoken, and in this manner, are onely by way of reprehension, and not of accusation, I am in some doubt, and I will aske Counsel, whether the speaking of these words be treason, if it were in this manner, this would very much mittigate the matter, but in this case here, besides the words spoken, here was a further prosecution, by Informing of a Justice of peace of the same, and so causing him to be bound to Answer the same at the Assises. In Blanch Flowers case, there was a peremptory accusation, which makes it a stronger case, this here in this case in question there is a positive charge, as namely, you have spoken words, (which I think are treason) or which are treason, as I think, and then, (which shewes his malice) he complaynes to a Justice of Peace (and endeavours what he can to prove the words) but the

Rewdam Plain. against Tucker Defendant.

Hill. 5. Jac. B. R. enter Blanchflower Plain. against Atwood Defend.

the partie was acquitted, and so lay all the words and proceedings together, the words are then scandalous, and Actionable, and a great deale of malice appeared in the prosecution. Flemming chief Justice, these words are scandalous and actionable, but he moved the Defendant for to pay the Plaintiff 10. l. for his dammages, who answered that he was but a poore man, and unable to pay. It was therefore by the Court referred to Warberton Justice to make an end of it, but by the Rule of the whole Court, judgement was given and entred for the Plaintiffe, but execution was to stay till Mich. Term, to see if an end might be made of it, in the interim, and also the Plaintiffe by Order to release to the Defendant all his dammages but 20. l. and so the Judgement was given by the whole Court for the Plaintiff, with a cessat executio for a time.

Judgment given for the Plaintiff, &c.

## *Wale* Plaintiffe, against *Hill* Defendant, entered *Hill.* 8. Iac. B. R. Rott. 1142.

IN an Action upon the case brought for a Conspiracie, for conspiring to indite him, for the supposed Counterfetting of a Letter, contrary to the Statute made 33. H. 8. cap. 1. and for malitious prosecuting of the same indictment at the Assises against him, and that of this the Jury there did acquit him, and for this the Action brought, and declares ad damnum, &c. The Defendant makes a speciall justification in this manner (s.) he shewes how that a stranger that was unknown to him, and that this Stranger brought him a letter from one of his friends, the which was a counterfeited Letter, and that with this Letter he had cousened him of 30. l. that the Plaintiff, and he which brought this Letter to him, were both of them unknown to him, but very like, and that at the same time, when this letter was brought unto him, three others were then present with him, and did see the delivery of the Letter to him, and they said, that if they did see the partie againe, & could hear him speake, they should know him again, that afterwards, they with him did see the Plain. and conceiving him in all likelihood to be the same partie, they all agreeing this to be so, upon all this suspition, he complained of him to one Mr. Collins a Justice of Peace, who sent his warrant for him, upon his examination of him, finding good cause of suspition, did binde him for to appear at the Assises, and did also binde the Defendant to appeare there, and to prosecute against him, the which he there did doe accordingly, and came and shewed all this matter to the Jury, and that the Jury there did then acquit him, and so justifies his proceedings against him. To this justification the Plaintiff doth demurre in Law, so that the only point was, whether this Justification be good or not. Davenport for the Plaintiff, that the Justification here is not good. It appears by 2. H. 7. fo. 5. H. 7. 5. 26. H. 8. fo. 9. and 7. E. 4. fo. 20. that common fame in some cases may be a good Justification in a false imprisonment, but this is to be taken, if the cause for which he was taken be publicke, but otherwise it is where the cause is private, for taking of a mans goods in a private manner, there he ought to shew specially, that the goods were found with him, and in his possession, and not to goe by belief, and to give credence to every particular man, but he ought for to shew some good and apparant Cause to the Court, and so is 7. E. 4. fo. 20. 13. H. 4. fo. 2. by Hankford: if an Action of debt be brought against I. D. and a Capias to the Sherif, who by this writt, takes a man named B. C. he may have a writ De Faux imprisonment against the Sherif, and he cannot here justifie, and deceptus de facie this will not serve his turn, but he ought to look to this at his perill, and so concluded for the Plaintiff, that this Justification is not good. Geo. Croke, for the Defendant, that the Justification here is good, the conspiracy, as it hath been shewed was for conspiring to have the Plaintiff Indicted, for counterfeiting of a letter, contrary to the statute

An action upon the case for a conspiracy to indict the plaint. &c.

2. H. 7. fo. 5. 4. H. 7. fo. 2. 5. H. 7. fo. 5. 26. H. 8. fo. 9. 7. E. 4. fo. 2.

statute of 33. H. 8. cap. 1. it appeares by the book of 11. H. 4. fo. 91. a. that it is not materiall, whether the Juſtification be true or not, but there ought in the ſame to be alleadged a Colourable cauſe of ſuſpition, and then it is good. 42. Eliz. there was a caſe in this Court between Payne and Rocheſter * In an action upon the caſe in the nature of a Conſpiracy, for procuring him to be Indicted, for ſuppoſed robbing of him, the Defendant Juſtified, and in this his Juſtification ſhewed how that he was robbed, by perſons to him unknown, and that one of them was upon a Brown horſe, and had a white cloake, and was like unto the Plaintiffe, and upon this he complayned unto Juſtice Gawdy, who upon his examination, finding cauſe to ſuſpect him, did commit him, and binde him over, &c & he did likewiſe bind the Defendant for to proſecute againſt him, the which he accordingly did, & the Jury did acquit him, & ſo juſtified. To this Juſtification the Plaintiffe demurred in Law, and this was ruled to be a good Juſtification, and there is no difference between this caſe, and the caſe now in queſtion, but onely in the names of the parties. The like caſe was in this Court, Hill. 5. Jac. B. R. Rott. 857. between Cox and Worrell, * In an action upon the caſe for a Conſpiracy, for procuring of him to be Indited, for ſuppoſed raviſhing of his daughter, of which he was acquitted, the Defendant did juſtify, and for cauſe did ſhew, that his daughter did complayne unto him, and cryed, ſaying, that ſhe was raviſhed by the Plaintiffe, upon this he Complayned to Sir Thomas Grymes a Juſtice of peace, who upon his examination, found the matter very ſuſpitious againſt him, and upon this, he bound him over, and bound the Defendant to proſecute againſt him, the which accordingly he did, and the Plaintiff was by the Jury acquitted, and this was here ruled to be a good juſtification, and that the action upon the caſe for a Conſpiracy did not lie againſt him, and ſo in the caſe now in queſtion there—being no difference between them here in this his Juſtification: that the partie Plaintiffe was like unto the partie, that brought unto him the Letter (s) Similis vultu, and like in ſpeech and ſo the juſtification is good. If he had been here Indicted upon a law, whereas there was no ſuch law, this would be a void indictment but here this—Indictment was to bring him within the compaſſe of the law, of 33. H. 8. cap. 1. that ſo he had done that Contra nos, which do frame, make, and counterfeit ſuch ſelfe letters, and tokens, thereby, ad recipiendum pecunias, and here he was indicted, for acting, and doing of this, contra ſtatutum in eodem caſu edit. & proviſ. here he was acquitted by the Jury, but no cauſe of action for him to have for this. Williams Iuſtice, if you had ſaid, and ſhewed in your Juſtification that you had been robbed, or couſened by this falſe letter, thus brought unto you, and that you had your ſelf ſuſpected the Plaintiffe for the ſame, and that thereupon you had complained, proſecuted, and given evidence againſt him upon theſe or the like probabilities, this had made the Juſtification good, but here it is not ſo expreſſed, and ſo the Juſtification is in this too ſhort, and not good. Flemming chiefe Iuſtice, there was a caſe in the ſtarre-chamber, the Poulterers caſe who ſent his man before him one way, and he was robbed going down a hill, another way, and ſuppoſed that the other Poulterer had robbed him, his ſervant ſaid unto him, there goes one before as like the partie that robbed you, as can be, he then demanded then of him if he was ſure of it, whereupon he went to him, and then ſayd, it is he,—and upon this he did charge him with it, cauſed him to be indicted, and he was by the Jury acquitted, and ſo brought his action, if you will charge one upon ſuſpition meerely, without any other probabilities, to warrant this, this then is a cleere Conſpiracy, but otherwiſe, where there are good and ſeeming probabilityes, they ought not to lay that he is the ſame party, for then if it prove not ſo, this is playn malice, or if the Juſtice of Peace to whom he complains, doth not find ſuch matter upon his examination, as that he thinks him worthy of commitment, and yet the partie will proſecute an Indictment againſt him, and he is acquitted, here an action upon the caſe for a conſpiracy well lieth, for this is malice apparant. Croke Juſtice, where it is laid in fact that there was an offence committed, there to ſay, Communis vox, & fama will well ſerve the turn, and ſuſpition withall, but where no ſuch offence was done, or committed,

42. Eliz. B. Paine againſt Rocheſter.

Hill. 5. Jac. B. R. Rott. 857. Cox againſt Worrell.

The poulterers caſe in Star-chamber

mitted there, otherwise it is, and this will be the difference, for if no offence were done in facto, then to prosecute him, is plaine malice, and if he be acquitted for such a prosecution, an Action upon the Case well lyeth here in this Principall Case, the prosecution is not grounded upon his owne suspition, but upon the suspition of others, and so for this cause, the justification is not good: this construing by letters is too usuall a thing. If a man indite another upon probabilities, and relies only upon them, and the PARTIE indicted be ACQUITTED he shall not have for this an ACTION upon the case for a conspiracie, a man is to ground his indictment, and his prosecution thereupon, upon his own suspicion, and this his suspition, ought also to be grounded upon other probabilities, and this ought to be his own suspicion, and not the suspicion of others, otherwise his justification will not be good; and herein he hath failed in this case, grounding his proceedings, and his justification thereby upon the suspition for these three other persons, which he saith were present with him, when the letter was delivered to him, and that they said, that if they did see the partie againe, and heard him speak, they should know him, and so they afterwards seeing the Plaintiff, and hearing of him speak, they conceived him, in all likelihood to be the same partie, and upon this their suspicion, he complained of him, and prosecuted against him, and the Jury did acquit him, so that here was nothing at all grounded upon his own suspicion, and so his justification not good, and the Plaintiff for this had just cause of action. Croke Justice, when a robberie is done, it is very usuall then to make hue and cry after the Felons, and to denote the parties by descriptions (s.) of their Horses, visages, and apparell, and if they meet any in such a manner described, for to make stay of them, and it appeareth Coke 4. pa. fo. 146. in Cutler and Dixons case, that an Action upon the Case doth not lie, where a man doth pursue the ordinary way of Justice, and so by the opinion of Williams and Croke Justices, and of Flemming chief Justice, the justification here is not good, and the Plantiff hath just cause of action, but because the Court was not full, & the matter being in reference for to be ended by way of mediation, the Court did forbear to give any judgement in this case, and as concerning the Writ of conspiracie, see Coke 9. pa. 4 fo. 26. b. in the Case of the Abbot de strata Mrcella where it is said that by the common Law, no conspiracie lieth when the partie was indicted: but although he be indicted, if the indictment be not sufficient in Law, the partie shall have his Writ of conspiracie, and see Coke 9. pa. fo. 36. b. in the Poulterers case, where the Writ of conspiracie doth lie, and where not.

Coke 4 pa. fo. 14. 6. in Cutler and Dixons case.

case and ad by way of mediation.

## *Lucas* Plaintif against *Fulwood* Defendant.

IN an Action of Debt, the Declaration was in placito debiti, and declares as for an Annuitie, as in a Writ, De annuali redditu a retro fore, it was 10. s. de annuali redditu arere, upon the generall issue pleaded, a verdict was given for the Plantiff. It wasmoved in arrest of judgement, that the Declaration here is not good, being in placito debiti, and by the Declaration it appeares to be for the arretages of an Annuitie. It was urged for the Plantiff, that the Declaration was good, being for 10. s. de annuali redditu, and that so it hath been in this Court adjudged, that for an Annuitie granted to one for years, an Action of Debt well lieth, but otherwise it is for an Annuitie granted to one for life, or in fee. Yelverton Justice, upon the first moving of this, conceived the Action of Debt to be well brought, and so if Lessee for years grants an Annuitie to another for years, an Action of Debt well lieth for it. Williams Justice, he needs not to shew any matter of Annuitie, but he ought for to count, as in another Action of debt.

An action of Debt for the arrerages of an Annuitie.

Yelverton

Yelverton Juſtice, the Declaration here is, debet, & injuſte detinet, (and alſo there is the word) (Subſtraxit) which proves this to be an annuity, Sr. Rob. Hitchin, for the Plaintiffe, that the Declaration here is good, and the action well brought, as it is laid, that an action of debt, will lie for a rent-charge granted for yeeres, becauſe that it hath continuance, and ſo alſo for the arrerages, but otherwiſe it is in caſe of a freehold, here in this caſe, is the word (Subſtraxit) the which proves this for to be an annuitie. As to the manner of the Declaration, if the ſame have matter of ſubſtance in it, if words, which are Nugatory, be therein added, this ſhall not make the Declaration to be bad and vitious. Geo. Croke for the defendant, that the declaration here is not good, and it appeares, Coke. a. pa. fo. 36. in walcots caſe, that this is matter of Subſtance, and not of forme in the Declaration, and the ſtatute of Jeofailes of 18. Eliz. Cap. 14. doth ayde Declarations which are onely defective in forme, but not ſuch as are defective in ſubſtance, as this Declaration here is, and therefore prayed Judgement for the Defendant. Williams Juſtice, the Plaintiffe here is not to have an action of debt, if the terme do continue, but if the terme be determined, an action of debt, then lyeth by him, and this in the debet, & detinet, and ſo is the booke of 9. H. 7 fo. 16, 17. where it is held, that if an Annuity be granted to one for yeeres, as long as the turne continues, a writ of Annuity lyeth for the ſame, and ſo is the old book of Entries. fo. 151. in Debt for an Annuitie: but here the Plaintiffe hath fayled in his action, for he hath brought his action of debt, and declares for an annuity, this is not good, but the Declaration is defective herein, in matter of Subſtance, and this cleerely is not ayded, by any ſtatute. Yelverton Juſtice, In this Declaration here there are all the words for an annuity, and more alſo for debt, ſuch a vitious Declaration as this is was never Seen, (Subſtraxit) is the word for an annuity, here in this caſe upon this Declaration, the Plaintiffe cannot have Judgement, as it is an action of debt, he cannot have Judgement, becauſe, that it appeares by his Declaration, that this was in caſe of an annuity, neither can he have Judgement as for an annuity, becauſe that by his Declaration, he demands the ſame, as a debt, and therefore he ſhall not have his Judgement, the one way nor the other, he ought not here to have declared, De annuali redditu, but the forme is, De placito quod reddat ei, &c. quas ei injuſte detinet, &c, et unde &c, and ſo is the forme, as it appeareth by the old booke of entries, as before is remembered, and it is cleere, that this word (Subſtraxit) cannot be in caſe of debt, but in caſe of an Annuity, the Court, (for the reaſons before alleadged, were all cleere of opinion that the Plaintiffes Declaration is not good, and therefore the rule of the Court was, quod querens Nil capiat per billam.

Croke 5. pa. fo. 36. in Walcots caſe.

Old Book of Entries fo. 151.

Judgment given for the Defend. &c.

Note, where a ſuperſedeas quia erronice, &c.

NOte by Williams Iuſtice and the Court, That a Superſedeas quia erronice, ſhall not be granted, but where there doth appear to be an error apparant in the very body of the Record, for if the partie be taken, and impriſoned upon a Judgement and execution, (whereas he hath payd the money, he ſhall not have here a Superſedeas, quia erronice, nor no other remedy in Court, but onely, an audita querela, and upon promiſe of enlargement, and not performing of it, an action upon the caſe onely lyeth for this, and no other remedy.

*Deanè*

## *Deane* Plaintiffe againſt *Newby* Defendant.

IN an Action of Debt brought, upon Nil debet pleaded, a Verdict was found for Plaintiff. It was moved in arreſt of judgement by John Harris becauſe the Plaintiff doth not ſhew how this Debt did firſt grow due. It was adjudged here in this Court, upon this difference, where a man was in debt to another in 20. l. he came to the partie and deſired him to forbear this for a certain time, and that he would pay the ſame to him at a day certain by him preſixed, there if he ſue him for this 20. l. after the day, he needs not to ſhew how this grew due, for the taking of a day certaine to pay the ſame, this proves the veritie and certaintie of the duty, but if a man be indebted to another upon a ſimple contract, and ſues for it upon a promiſe to pay it, be it upon ſuch a promiſe, or the like, the Plantiffe ought to ſhew the cauſe of this, and how the ſame grew due in his Declaration, and therein to ſpecifie, how, and in what manner the ſame grew due, for in the one caſe (s.) in the latter it was a duty preſently, but a day given for payment, but in the other caſe not ſo: and therefore he ought there to ſhew the ſpeciall cauſe how the ſame did grow due, and ſo is the difference, which was agreed to be ſo by Hen. Yelverton, and by the Court, quod nota.

where a Plain. is to ſhew how a debt ſued for became due, and where not.

Note the difference.

## The Daughters of *Thomas Dens* Plaintifs againſt the Executors of——*Dens* their Brother Executor of *Thomas Dens* his Father Defendants.

IN a Conſultation prayed to the ſpirituall Court, the caſe upon the conſtruction of a Will, and the queſtion upon the caſe was this. Thomas Dens the Father did by his will, deviſe certaine leaſes which he had of Land, unto Dens his eldeſt ſonne, except the ſumme of 140 l. to be payd out of it, for portions, for his daughters, and afterwards makes his eldeſt ſon his executor, and dyes, and the ſonne makes his will, and his executors, and dyes before payment of this money to the daughters, after his death, the daughters ſued his executors in the ſpirituall Court for this money as for a legacy, to them given by their father, and upon this a Prohibition was prayed, and granted, Suppoſing this to be a rent, or a Legacy iſſuing out of land, and this day the daughters did move for a Conſultation, to have proceedings in the ſpirituall Court, in as much as this Legacy is not paid unto them, and in regard that no action of account lies againſt an executor, and ſo is Littleton pla. 125. and F. N. B. fo. 117. letter. C. and ſo they have no remedy, at the Common law, againſt an executor of an executor, the queſtion here was, whether this ſhall be laid to be a legacy, the ſame being for to iſſue out of land, or not. Hen. Yelverton, this is not iſſuing out of any Land. Yelverton Juſtice cited 4. & 5. Ph. & Mar. Dyer. fo. 151. pla. 5. Note that by the opinion of all the Juſtices of both Benches, that where a man doth deviſe by his laſt will and teſtament in writing, that his executors ſhall ſell his land, and that one part and portion of the money his daughter ſhall have, for her advancement, and dyes, and his executor ſell the Land, but doth not performe the Legacyes, and ſo for this the daughter ſueth the executor in Court Chriſtian, a prohibition well lyeth in this caſe, becauſe it is not a legacy teſtamentarie, but iſſuing out of land, by reaſon of the laſt will, for the performance of which the Court Chriſtian cannot meddle, but the partie may well have an action of—accompt at the common law, but by

Dens his will and the Conſtruction of it. &c.

Littleton pla. 25. F. N. B. fo. 117. letter. C.

9. Eliz. Dyer fo. 264. pla. 41. where a man deviſed his—ſoccage land to be ſold by his executors, and the money had for the ſame, to be diſpoſed of in legacies, mentioned in the Will, and one of the legataries after the probate of the teſtament, ſued in Court Chriſtian for the legacie, and a prohibition prayed, it was queſtioned, whether the Prohibition did lie or not, and there by Catline, Dyer, and Sanders, that the prohibition did not lie, for that the money was aſſets in the handes of the executors, and no remedy for a legacy in the temporall Court. Yelverton Juſtice, and the Court, ſuch a legacy is not to be ſued for in the ſpirituall Court, but by an action of accompt, at the Common law againſt the executors. Hen. Yelverton, they cannot have an action of accompt againſt the executors. Flemming chief Iuſtice, this here, is out of the reaſon of an accompt, and no remedy here but in the nature of a legacy, when the money is received. Yelverton Iuſtice, if a man deviſeth a leaſe for yeeres, to his executors, and doth deviſe, that his executors ſhall pay ſo much to his daughters, in what Court ſhall they now ſue for this, not in the ſpirituall Court, but here. Curia agreed with him in this. Hen Yelverton, no accompt lies againſt an executor, of an executor, the Court was moved, what remedy is there to be had for the money, by the Plaintiffe, here in this principall caſe, and where the ſame being in the nature of a legacy, the Court was cleere of opinion, that they had no remedy at the Common law for the ſame. Croke Iuſtice, if it be a legacy out of land, there the ſame doth ſavour of the realty, and the ſame may be ſued for here, but where, it is not out of land, there it is as a legacy ſpirituall, and to be ſued for in the ſpirituall Court, and not here, the Court did grant a Conſultation here in this principall caſe. But the order of the Court (and that upon the prayer of the partie Plaintif, that in the prohibition was this, they would pay the legacies at Midſomer day next enſuing, and if not, that a Conſultation ſhall be granted. And as for the Coſts, the Court referred the ſame to M. Man. Secundary to conſider thereof and to taxe them. Yelverton Iuſtice, againſt the granting of the Conſultation, for that they have their remedy at the Common law, and to the which they ought for to reſort, as their proper remedy. The whole court againſt him cleerely herein, and ſo by the rule of the Court, a Conſultation was granted for the Plaintiffs, proceedings in the ſpirituall Court, (in caſe the moneys were not payd them, at the time prefixed) quod nota.

A conſultation granted for the Plain.

## *Doctor* Layfield Plaintiffe againſt *Hellicar*, Defendant.

An Action of treſpaſſe, the Defend. doth juſtifie, the Plaintif demurs.

IN an action of treſpas brought, Quare clauſum fregit &c. the Defendant pleades and make a ſpeciall Juſtification in this manner, by intitling of himſelf under the Kings letters patents. To this plea the Plaintiffe demurres in law, for that he intitles himſelf by the Kings letters patents, and doth not plead, (as he ought to do) (hic in Curia prolat.) the onely queſtion was whether the pleading here be good, or not. Iohn Moore for the Defendant, that the pleading of this Juſtification is good, though he do not plead, (hic in Curia prolat.) Hendon for the Defendant, in this caſe, the Queene made a leaſe for 30. yeeres, the Patent, makes a leaſe to another for part of it, under which leaſe, the Defendant here doth claime, and ſo juſtifies, he having but a ſmall terme, wheher he in his Juſtification, and pleading, ought for to ſhew the principall patentee, the which was made to his leſſor, and the which belongs not unto him, his Juſtification is good, without—pleading, hic in Curia prolat. Williams Iuſtice, admit the patentee makes 20. ſeverall aſſignements over, they all of them in pleading, ought to ſhew the Originall patent, if ſo be that they do juſtify under it. Hen. Yelverton, he is here but an aſſignee of parcell. Williams Juſtice, in 28. H. 8. Dyer. fo. 29. pla. 200. where the difference is put, when the grantee of the King doth grant over all his intereſt, there the patent belongeth

longeth to the Grantee, and therefore he is to shew the Patent, and to plead, hic in curia prolat. but otherwise it is when he grants but only parcell of his interest away: the King cannot convey or passe a Lease to an other, but by his Letters Patents, and in pleading of it, the place where it was made, and the date thereof ought to be alledged, and also in pleading to say hic in curia prolat. or else the pleading will not be good.

Note the difference where the whole, and where but parcell is granted as to the plead. hic in Curia prolat.

Yelverton Iustice did agree with him herein, that he is to shew in pleading the place of the date in this Principall Case: by the Rule of the whole Court, Judgement was given for the Plaintiff, for that the Defendants justification here was not good, because he claiming under the Letters Patents, did not plead hic in curia prolat. Williams Iustice and the whole Court cleerely, the Defendant ought to have shewed in his justification, the place where the Patent was made, and divers Books there be for to prove this, and also he ought to have pleaded hic in curia prolat. and for this omission, the justification is not good, and so judgement was given by the Court for the Plaintiffe.

Jndgement given for the Plaintiffe.

## *Rosse* Plaintif against *Pye* Defendant, entred Trinit. 8. Jac. B. R. Rott. 22.

IN an Action upon the Case *Sur un Assumpsit* upon the Defendants plea, the Case appeared to be this, the Defendant for good consideration, did promise for to appear at the next Assises, and to save the Plaintiff harmeless there, from a Recognisance, the which was entred into by him for his appearance there, in performance of this promise by way of plea, he shews that he procured a Certiorare to remove and certifie the said Recognisance, and that he had delivered this, tali die ad Assisas, Edwardo Coke, & Davidi Williams then Justices there of Assise, whether this be a good performance of his promise or not, as the same is here pleaded, was the only question. It was argued for the Plaintiff that this Plea is not good, being no performance of the promise, 3. Assises fo. 4. b. a man was indicted at the Assises for the stealing of two Horses, this was removed by a writ of Certiorare into the Chancery, and so in B. R. this was at the suite of one R. the indictment removed cum omnibus ea tangentibus, and for that the indictment was not according to the Writ, for this was de uno equo this is there ruled to be no good removall, neither could he be arraigned, nor received in this manner: here the Recognisance was to have him to appeare before the Justices of Assise, the Defendant here did assume that he would there appear and save him harmlesse, and in performance of this, by way of Plea, he saith that he had procured a Certiorare, this is no good Plea, nor any performance of his promise, and so the Plaintiff hath good cause of action, and his Action here is well brought. Yelverton Justice, it is a hundred to one that the Certiorare did issue out of this Court, it may issue out of the Chancery, but it is more usuall to be here out of this Court, the delivery here of this Certiorare is issuable, and therefore he ought to have in his Plea expressed a place where the delivery was, for the venire facias, the which he hath not done, and so failing in this, his Plea is not good. It was alledged for the Defendant, that as to the place, the same is expressed to be at the Assises, and this is sufficient. Williams, Fenner, & Yelverton Justices, cleerely this is not good, but he ought to shew the place in certain, where the the delivery of the Certiorare was, for the venue, and this is a plaine case, and there is no help for it, he having not here in his Plea mentioned the place, for the Assises vary in the place of holding the same. Williams Justice, he ought also to have shewed in his Plea, that this Certiorare was delivered at the then next Assises, for that the Assises may be adjourned. Flemming chiefe Justice, he ought cleerely in his Plea to have laid a

An action on the case for a promise the case upon the Defendants plea.

place ſpecially, and certainly, for that this is matter in fact, and iſſuable, and notwithſtanding, by the delivery of the Certiorare, their hands are ſtayed, yet a place certaine ought to be laid, and this on neceſſity ought ſo for to be, in all caſes, where the place is iſſuable. The Court were cleere of opinion, that notwithſtanding this Certiorare, doth ſhut, and forecloſe the handes of the Juſtices of Aſſiſe, yet they might very well have entered there his appearance. The Court were cleere alſo of opinion, that in this his plea, he ought to have expreſſed that this was the next Aſſiſes, & although this appeares to the court, to be the next Aſſis, yet he ought in his plea to have ſhewed this ſpecially to the Court, for that the Aſſiſes might be adjourned to another place, and therefore the whole Court agreed in this that his allegation in his plea, that he Delivered the Certiorare at the Aſſiſes, is not good, but that he ought to ſhew the place certaine where the delivery of the Certiorare was, this being iſſuable, and as Flemming chief Iuſtice obſerved, the places, for the holding of the Aſſiſes, are not certaine, but oftentimes changed, at the pleaſure of the Judges, and ſo by the opinion of the whole Court, the Defendants plea here is not good, and therefore by the rule of the Court Iudgement was entred for the Plaintiffe.

Judgement given by the Court for the Plaintiffe.

## *Briſcoe* Plaintiff againſt *Knight* Defendant, entred. Pach. 8. Jac. B. Rott. 271.

An action of Debt upon a bond for performance of Covenants.

IN an action of Debt upon a bond, for not performing of covenants upon the Defendants plea, and the Plaintiffes breach aſſigned, the caſe appeared to be this, the Defendant for a ſumme of money borrowed of the Plaintiffe, did morgage his land unto him, by a deed poll, and for better and further aſſurance, divers Covenants by deed were made between them, that the Plaintiffe ſhould enjoy the land quietly, and free from all Incumberances, and in the end of the Deed of Covenants there was this Proviſo, that if the Defendant ſhould pay 80.l. unto I.S. which was owing to him by the morgagee, that then it ſhould be lawfull for the Defendant to reenter into his land, and to have the ſame again, and afterwards the Defendant, did enter into a bond to the Plaintiffe, conditioned for the performance of all the Articles, payments, Covenants, and agreements between them, the Defendant doth not pay the 80.l. to I.S. upon this the Plaintiff brings an action of debt againſt the Defendant for non-performance of the Covenants, he ſuppoſing this Non-payment of the 80.l. to I.S. (which was ſpecifyed in the Proviſo to be payd,) to be a breach of Covenants, and that this ſhould be parcell of the Covenant. The Court was cleere of opinion, that this proviſo is no part of the covenant. Flemming Iuſtice chiefe. It is by this Proviſo, provided, that if he pay the 80.l. that then he ſhall reenter, this payment is not within the Covenant, and penalty of the bond, entered into for performance of Covenants, for he may chooſe here, whether he will pay this, or not, for if he doth pay it, he may then reenter upon the Plaintiff, and have his land againe, and then the Plaintiffe was not to enjoy the land, by his feoffement without diſturbance, as he ought to doe, by the not paying of this 80. l. but the Covenant for quiet enjoying of the ſame, is not broken, by this non-payment, for he is not compellable to make this payment, but this is a thing conditionall (s) to be done, or not done by him if he payes it, then to reenter, if not, then the Plaintiffe to injoy the land, according to the Covenants, and according unto this was the opinion of the whole Court cleerely, that the Defendant may performe the Covenants here, without payment of this 80.l. and that the none-payment of this is no breach of Covenant, and ſo the Plaintiffe for this none-payment, had no cauſe of action upon his bond againſt the Defendant, and therefore the rule of the court was, quod querens Nil capiat per billam.

Judgement given by the Court for the Defendant. quod querens Nil capiat per billam

Sampſon

## *Sampſon* Plaintif againſt *Cranfield* and *Upton* Defendants.

IN an Action of treſpaſſe for an Aſſault and Battery, ad damnum of the Plaintiff, the Defendants plead Non culp. a verdict found for the Plaintiff againſt both the Defendants, and the Jury aſſeſſe ſeverall dammages to the Plaintif (s) ſo much againſt the one, and ſo much againſt the other, ſeverally, and coſts to the Plaintif entirely againſt them both. Richardſon for the Defendants moved in areſt of judgement, for that they being joyntly ſued, the Jury have given againſt them ſeverall dammages, whereas the ſame ought to have been joynt and entire againſt them both. The whole Court cleere of opinion againſt him herein, that the battery is ſeverall, and ſo the dammages ought to be, and therefore the Jury have done well in this, in giving to the Plaintif ſeverall dammages againſt the Defendants, but coſts entire are to be given to the Plaintif againſt both the Defendants, and the reaſon why the dammages are in this caſe to be ſeverall, becauſe that the battery of the one, cannot be the battery of the other, and that the battery of the one, may be greater then the battery of the other, but otherwiſe it is in Treſpas, for cutting down and carrying away of Trees, for that this is a joynt act, and the dammages are to be entire, but otherwiſe it is in this principall caſe of Battery againſt two, the Jury have done well in giving of ſeverall dammages, and that for the reaſon before, becauſe the one battery may be greater then the other. Williams Juſtice, it is a very cleere and plaine caſe, that the Jury here have done well in their verdict, in giving to the Plaintiff ſeverall dammages againſt the Defendants, but coſts entire, ſee to this purpoſe, touching the Verdict of the Jury, and judgement according to the ſame 1. R. 3. fo. 1. b. 2. 3. 4. and ſo in this principall caſe, by the Rule of the Court, judgement was given for the Plaintiff.

Action of treſpaſſe for an aſſault and battery againſt 2. verdict for the Plaintiffe, ſeverall damages.

## *Durand* Plaintiffe againſt *Childe* Defendant, entered Hill. 8. Iac. B. R. Rot. 687.

IN an Action of Treſpaſſe, Quare clauſum fregit, upon the Defendants Plea and juſtification, the Caſe appeared to be this, the Defendant had a Cloſe adjoyning to the high-way, being the waſte (as was ſuppoſed) of the Plaintiff, Lord of the Manner, the Cattell of the Defendant coming out of his Cloſe, did caſually ſtray into the high-way, and for this treſpaſſe by them done in the high-way, or waſte of the Lord, was the Action brought by the Plaintiff, as Lord, all, which ſo appeared unto the Court upon the pleading. Croke Iuſtice, if the cattell of the Defendant ſtay there any time, and feede upon the paſture there, the Plaintiffe, being Lord may have an action of treſpas. Williams Iuſtice, if my Cattell go into the high-way, who ſhall puniſh them, or me for them. None, he ſayd to the Plaintiffes Counſell, you may argue this as long as you will, ad Calendas græcas, but cleerely this action of treſpas here brought, will not lie, and the Plaintiff, was much blamed by the Court for bringing of this action. Fenner Iuſtice, the Cattel ought not to feed in the highway but was againſt the action of treſpaſſes, the place where the Cattell were, appeared to be alta via regia, and ſo the ſtronger againſt the Plaintiffe. Yelverton Iuſtice and the whole Court, diſliked much of the action, and were of opinion againſt the Plaintiffe, but the matter in difference, between the parties, being upon Comprimiſes, the Court delivered no Iudgement therein.

Ended by Comprimiſe.

An action of treſpas by the Plaintiffe as Lord for a treſpas in his waſte, by the Defendants Cattell.

*The*

## *The Earle* of Northumberland Plaintif, againſt *Wheeler* and others Defendants, entered Hill. 7. Iac. B. R. Rott. 1133.

A trover and Converſion againſt a Coppyholder for life, for cutting down timber trees.

IN an action upon the caſe, for a trover, and converſion, of certaine timber trees, the caſe, and queſtion was, as touching the power of a Coppyholder for life, for the cutting down of timber trees, and whether ſuch a Coppyholder may preſcribe by the law for to cute down timber trees, growing upon his Coppyhold land, or not, Noy for the Plaintiffe, that he cannot. Williams Iuſtice ſuch a Coppyholder for life cannot preſcribe for to cut down timber trees growing upon his Coppihold land, and to this purpoſe, in Lutterall and woods caſe in the C. B. it was adiudged in poynt, that a Coppyholder for life, cannot preſcribe to cut down timber trees—but by way of uſage he may for reparations, and as touching uſage,—and cuſtom, it appeareth, in 21. E. 4 fo. 28. b that uſage, and cuſtom, to turne their plow, upon the hadeland, not ſowed with corne, it is good, but there it is ſayd by Littleton, that a preſcription againſt reaſon is not good, as if a cuſtom be alledged, that none ſhall put his Cattell into his land, before the Lord do put his Cattell in, this is held to be a voide cuſtom, becauſe it is againſt reaſon, for if the Lord will never put in his Cattell, the tenants by this ſhall loſe the profite of their ſaile, (but otherwiſe it is, where a day is limited, and to this purpoſe is, 22. E. 4. fo. 8. A. b. pla. 24. and that a preſcription which is againſt reaſon is void, and ſhall not be allowed by law, ſee for this Littleton, fo. 46. pla. 209. &. pla. 212. and 5. H. 7. fo. 9. b. &. 10. a. In this principall caſe here the cleere opinion of the Court was, that this preſcription here for a Coppyholder for life to cut down timber trees, is a preſcription againſt reaſon, and ſo void in law, and ſo was the opinion of the whole Court, but no Iudgement was then given.

Lutterall & woods caſe. in the C. B.

a preſcription againſt reaſon is void.

## *Iohn* Stronge Plaintif, againſt——

A procedend. to the Court of requeſts. Strongs caſe.

IN a Prohibition to ſtay proceedings in the Court of Requeſts, the caſe appeared to be this, a bond entred into, for payment of money, upon the payment of which money, the teſtator did promiſe for to deliver up the bond to be cancelled, the money was payd, but the bond not delivered up, the teſtator dyes, afterwards the Obligor commenced ſuite in the Court of Requeſts, againſt the executor, for relieſe in equity, and to have the bond delivered up, the executor ſuggeſts, that he knowes nothing of the payment of the money, being no wayes privie thereunto, and ſo prayes a Prohibition, this being moſt proper for a triall at law; the other prayed a Procedendo, for that he had no remedy to be relieved at the Common law, in regard that this promiſe made by the Teſtator, for to deliver up the bond, is ſuch a perſonall aſſumpſit as that the ſame moritur cum perſona, & therefore by the rule of the Court, A procedendo was granted, there being juſt cauſe for him, in this caſe to proceed in the Court of Requeſts, and there to be relieved. Note in this caſe, by Williams Iuſtice upon a ſimple contract made by the Teſtator, an action of Debt, lyeth cleerely againſt the executor, and ſo it hath been before adjudged here in this Court, and ſo it is alſo if the Teſtator do promiſe to pay money, upon a good Conſideration, and dyes before payment, an action upon the caſe lyeth cleerely againſt his Executor upon this promiſe, for payment of the money, and in this the court all agreed.

Debt againſt an executour upon a ſimple contract of the teſtator.

An action upon the caſe againſt an executor for a promiſe bythe teſtator

Note

NOte that one was presented ex Officio, in the Ecclesiastiall court, for the not frequenting of his parish church, he there pleads, that this was not his parish Church, but that he had used, for to frequent another parish Church, and to resort unto this, and because they in the spirituall court would not receive his plea, the Court was moved for a prohibition, for that by the Law, in the time of King. H. 3 E. 3. and E. 4 they in the Ecclesiasticall Court, have not any power, to intermeddle, with the precinct of parish Churches, neither are they there to judge, what shall be sayd to be a mans parish Church, and so was the opinion of the whole Court, and therefore by the Rule of the Court a prohibition was granted.

*A presentment ex officio for not frequenting his parish Church.*

*A prohibition granted by the Court to the Ecclesiasticall Court.*

## Herne Plaintif, against *Lylborne* Defendant.

IN a writ of error for to reverse a Judgement given at Durham in a writ of right there brought. Davenport for the Plaintiffe in the writt of error, that the Judgement is erroneous, and ought to be reversed, 27. February. 6. Iac was the Teste of the writ—Licet solenniter exactus fuit, non venit, sed defaltum fecit, at the day of the appearance. As to the errors, severall imparlances there were, at 4. termes, at the last day, the partie did not appeare, and upon this default of appearance, a Judgement finall was there given, the which Judgement is erroneous, The first error insisted upon, was (the entrie being) Quia dominus Episcopus Durell. nobis remisit curiam suam, and after this no further proceedings in the suite ought to have been there—but in Banco, and for this cause, the Judgement there given, est in hoc, erroneous, for when he doth remittere Curiam suam domino regi this suit is then to be removed by a Tolt, and this so appeares in Fitz. Nat. bre. fo. 2. F. &. fo. 3. F. &. fo. 4. A. B. and with this agrees the Register. fo. 4. A. quia dominus remisit Curiam suam regi, and there the forme is expressed and set down excellentissimo principi domino, Henrico octavo, &c. and with this agrees the old Booke of entries fo. 246. where the letters of the Lord for remitting of his Court, are set down. The Second error, the writ of right is here brought, the demandant comes, the tenant Imparles till an other terme, and so from one terme to an other, and then at the last day, Licet solenniter exactus non venit &c. and upon this, Consideratum fuit per Curiam, that a finall Judgement should be given, (s) quod recuparet per defaltum, this assigned for error, that Judgement finall ought not to have been given according to Penryns case, Coke. 5. pa. fo. 86. a, where it is Resolved, that if the tenant after the mise joyned makes default, Judgement finall upon this Default shall not be given, but a petit Cape for that peradventure, he may save his Default, by Fitz. Nat. bre. fo. 6. A. upon default after the mise joyned the Judgement shall be finall as well against the Demandant by his Non suit, as against the Tenant, if he make Default, after the mise joyned, and so is the booke of 35. H. 8. Dyer. fo. 56. pla. 17. and 1. Marie Dyer, fo. 103. pla. 8 that in such a case Judgement finall shall be given against an infant, and so the difference is put in Fitz. Nat. bre. fo. 5. N. &. fo. 6. A. where the default is before, and where after the mise is joyned, and as before it appeares in Penryns case, that after the mise joyned upon a default, no Judgement finall shall be given without a petit Cape before, and that upon the former reason given in 26. H. 8. fo. 8 it appeares there by Fitzherbert, that in a writ of right Jugement finall shall not be given, till after the mise joyned, and there it is held, that if in a writt of right, the tenant doth vouch, and recovers in value, a Judgement finall, shall not be for the Tenant, against the vouchee, and so is, 10. H. 6. fo. 2. that a Judgemeut finall shall be given, for the Demandant, against the vouchee to hold quite but for the Tenant a common Judgement en value against the vouchee, and not a finall Judgement, and where a Judgement final shall be, and where not, upon Default of the Tenant, after the mise joyned upon the meere right, but a petit Cape, vide 12. H. 7, fo. 10. &. 12. E 4. fo.

*A writ of error to reverse a judgement, &c.*

1.

*F.N.B. fo. 2. F.fo.3.F.fo 4 A.B. Register fo.4.a. Old Book of Entries fo. 246.*

2.

*Penrines case 10. H. 6. fo. 2. Note the difference. 12. H. 7. fo. 10. 12. E. 4 fo. 21.*

Taltarums caſe old booke of entries. fo. 244. 246. 247. 1, Mary Dyer fo. 98. pla. 51. &. fo. 103. pla. 8. the Lord Windſors caſe.

ſo. 20, 21. ea Taltarums caſe, by Fairefax, and in the old booke of entries ſo, 244. 246. and 247. and 1. Mary Dyer. ſo. 98 pla. 51. & ſo. 103. pla. 8. the Lord Windſors caſe. Walter for the Plaintiffe, in the writ of erꝛoꝛ, that the Judgement giuen at Durham is erroneous, and ought to be reuerſed, there is not a moꝛe uſuall courſe, then in ſuch a caſe, to haue a petit cape, foꝛ if he be impriſoned, he hath good cauſe to ſaue his default, by ſhewing of this befoꝛe the ſtatute of 27. H. 8. cap. 2. the Biſhop of Durham, was as a King, and might pardon all matters, and that he had Iura regalia the ſtatute of 27. H. 8. did take away part of it, euery Franchiſe and liberty hath his eſſe and commencement fꝛom the Cꝛown, the King (notwithſtanding this) hath powꝛer, and Juſtice, alſo remayning in him, foꝛ to do right and Juſtice, and this is tacita exceptio, in all grants of liberties by the King, and that this right may be done by his Judges. Treaſons, Felonies, and murders pardoned, per Epiſcopum, he hath his Judges, and they haue their fees fꝛom him, and in writs of treſpas, the writ is, of treſpas, done contra pacem epiſcopi, all this was ſo befoꝛe the ſtatute of 27. H. 8. cap. 24. ſo that now the Biſhop cannot remittere curiam but unto the Kings Court, to be there tried, ſince the ſayd ſtatute, and there is no booke in the law, adjudged in poynt, that a Judgement finall ſhould be giuen, as in this caſe, the ſame was, foꝛ that after a Judgement finall giuen, there is no remedy foꝛ to be had, and ſo the Judgement thus there giuen, is foꝛ this cauſe erꝛoneous and ſo ought to be reuerſed. Geo. Croke foꝛ the Defendant, that the Judgement was well giuen, and ſo to be affirmed, there being no ſufficient erꝛoꝛ aſſigned, foꝛ to reuerſe the ſame. As to the firſt erꝛoꝛ aſſigned, the ſame being, becauſe the writ of erꝛoꝛ was bꝛought here, and is, Quia dominus nobis remiſit Curiam ſuam, and thereꝛoꝛe it hath been uꝛged, that the ſuite ought to haue been in the Court of C. B. and not there where it was, and thereꝛoꝛe the Judgement there giuen, was foꝛ this cauſe erꝛoneous. Quia Epiſcopus remiſit Curiam ſuam Regi, as to this it doth appear by the booke of 9. H. 7. 12. fo. b. that a recouery in the Court of C. B. of Land in Durham, is void, quia breue Domini Regis, doth not run there; in 1. E. 4. fo. 10. It is there held, by all the Juſtices, that if one be ſurety foꝛ another, to keep the peace, and he breakes the peace, and hath Lands in Durham, that in this caſe the King ſhall ſend to the Biſhop of Durham, oꝛ to his chancellour foꝛ to doe execution, and when it is ſayd, dominus remiſit Curiam ſuam by Fitz: N. B, this is to be underſtood, of the preſent Lord, but where the Land lyeth in Durham, this is no cauſe foꝛ remoual of the ſame, and by the Law, it cannot be, and this is the uſuall forme, as appeareth, by all the preſidents. As to the ſecond erꝛoꝛ aſſigned, being the matter of the greateſt difficultie, and this is upon the finall Judgement there giuen whether this ought to haue been ſo done, oꝛ not, where iſſue is joyned, and a Defendant, no finall judgement ſhall be giuen, without a petit. cape. It appeares by Trin. 12. E. 2. Fitz tit. Iudgement placito. 234. & 235. that a petit cape is to be awarded, befoꝛe a finall Judgement ſhall be giuen, upon a default, after the miſe joyned, and ſo is Penryns caſe Coke 5. pa. fo. 85. &. 86. that after the miſe joyned and at the Niſi prius, the Tenant makes default, no Judgement finall ſhall be giuen but a petit. cape to be awarded, but this doth differ fꝛom the caſe here now in queſtion, which is not ſo, but here it is upon an Imparlance, and a default, and ſo upon this Default, a generall Judgement is to be giuen, quod recuparet ſeiſinam, & erit quietus, being a default after Imparlance, as here in this caſe, a Judgement finall ought to be giuen, and ſo the Judgment here well giuen, and where the default is, in contempt of the Court, there a Judgement finall ſhall be giuen. 28. H. 8. Dyer. fo. 24. placito. 152. and Mich. 19. E. 2. Fitz. title Iudgement placito 238. as touching this, where the Tenant appeares and Imparles, at the Niſi prius, the Tenant appeares, and doth challenge the enqueſt, after the enqueſt charged, and returne, to giue up their verdict, the Tenant departs in deſpite of the Court, and his default recorded, at the day, in Bank, ſeiſin of the land was here awarded, without any petit cape, becauſe that his preſence was recoꝛded, and afterwards he departed in deſpite of the Court, and ſo a Judgement finall was here giuen, upon this default, without

1.

2.

Trin. 12. E. 2. Fitz. tit Judgement pla. 234. 235.

Coke. 5. pa. fo. 85. 86. Penryns caſe.

Mich. 19. E. 2. Fitz. Judgement. Pla. 238.

without awarding of any petit cape, in 7. H. 4. fo. 19. A. B. If the Tenant makes default, after Imparlance, and before any plea pleaded, this is in the nature of a departure in despite of the Court, and a Judgement finall, shall be here given becaule he doth mocke, and abuſe the Court. Hill. 13. H. 4. Fitz. title Judgement placeto. 245. If the tenant comes in, and confeſſeth the action, in a writ of right, a Judgement finall ſhall not be given, but a generall Judgement, quod recuperet ſeiſinam, and this ſhall be no barre, but it is there ſayd that if he do Imparle, unto a day, and after makes default, there a Judgement finall ſhall be given, and with this agrees 12. E. 4. fo. 21. but it hath been ſayd, that the difference is, if he Imparles, to another day, in an other term, and where it is in the ſame terme, according to 12. H. 7. fo. 10. and 12. E. 4. fo. 21 this is there in 12. H. 7. but the opinion of Vaviſours, but by 10. H. 6. fo. 2. and by Hillar. 33. E. 3. Fitz. tit. Judgement placito. 252. &. 1. Mar. Dyer. fo. 98. &. fo. 103. that when the Tenant hath taken a day by Imparlance, and makes default, there a Judgement finall ſhall be given, and there are the books for to prove this, (s) 38. H. 6. fo. 33. If the Tenant in a writ of right, after Imparlance, makes default, the Judgement ſhall be finall, in a reall action, and in a right of right 39. H. 6. fo. 16. touching this, and more direct in point, if in a writ of right, the Tenant makes default, before any plea pleaded, and after Imparlance, the difference there taken where the Judgement ſhall be, quod recuperet ſeiſinam and where not, In this caſe here, Six ſeverall Imparlances have been, and at the Sixth, he makes default. It was ruled in the Court of C. B. that if the Tenant do Imparle, and this unto a day in an other terme, or be it in the ſame terme, and at the day, he doth not plead, but makes default, no difference there is, but in both theſe caſes a Judgment finall ſhall be given, and ſo this Judgement was well given, and is not erroneous, but ought to be affirmed,——Latten, for the Defendant, that the Judgement ought to be affirmed, and that this finall Judgement here in this principall caſe was well given, appeareth by 3. H. 6. fo. 55. in a writ of right, Judgement finall given upon the default of the Tenant by Babington in caſe of fee ſimple land, ſuch a Judgement upon the default of the Tenant, ſhall be given againſt the land, and ſhall be, as if it had been tried by the great Aſſiſe, and ſo is 13 H. 4. fo. 8. Fitz. title Judgment placito. 228. If the Tenant in a writ of right, after the miſe joyned makes default, the demandant ſhall have a Judgement finall to recover ſeiſin of the land, without any petit cape, and this is contrary unto Panryuns caſe. Coke 5. pa. fo. 86, But againſt this it was urged, for the Plaintiffe, in the writ of error, by Walter that a Judgement finall is not to be given, before that the Court doth ſee the finall right of the parties, this here is a writ of right, and the right cannot be ſeen as yet, upon the default, and therefore a Judgement finall is not to be given, for the contempt of the Defendant, a Judgement finall ſhall be given, and that for his contumacy, (as the Civilians ſay) but this ought ſo to be, when it is in the ſame terme, he contemnes the Court, and therefore the Court doth alſo contemn him, but the difference will be where the ſame is, in reall actions, and where in a writ of right where the ſame ſuite is in reall actions, there the party may have his remedy, and where he may have his remedy there upon his default a Judgement finall, may be given, but where he can have no other remedy, there no Judgement finall ſhall be given, the difference alſo will be where the Imparlance is, in a reall action, and where in a writ of right, and where the ſame is, at a day certaine in the ſame terme, and where the ſame is to no day certaine, In this caſe a finall Judgement ought not to have been given, and ſo for this cauſe the judgement is erroneus, and ought to be reverſed—Williams Juſtice at the day of appearance, the tenant did not appear, but made default, and upon this default, a Judgement finall was given, this Judgement is cleerely erroneous, for that before the Judgement finall had been given, there ought firſt to have be awarded a petit cape, and for this omiſſion, the Judgement is cleerely erroneous, and in this, the Court did agree in opinion with him, but by the whole Court, if after the miſe joyned upon the meere right, the Tenant makes default, and a Judgement finall is given upon this default, without any petit cape, that

7. H. 4. fo. 19.

12. E. 4. fo. 21.

Coke. 5. pa. fo. 86. Penryns caſe.

Note the difference.

ſuch a Judgement ſtnall is well given, ( contrary to the reſolution, in Penryns caſe.

Coke. 5. pa. fo. 86. Penryns caſe.

Coke. 5. pa. fo. 86, A. Williams Iuſtice, the writ here is not good, but erꝛoneous, foꝛ that herein the ſtatute of 32. H. 8. capit. 2. foꝛ the Limitations of writs of right, and within what time they are to be bꝛought, where the ſame is gꝛounded upon th Seiſin, oꝛ poſſeſſion of his anceſtoꝛ, oꝛ predeceſſoꝛ, and where upon his own ſeiſin oꝛ poſſeſſion, is not here duely obſerved, foꝛ that the ſame being bꝛought upon your own ſeiſin, you ought to have declared infra trigint. annos jam ultimo elapſos, and ſo the Statute ſets it certainly down, that you are not to declare upon your own ſeiſin, in a writ of right, but in the ſame manner as the ſtatute preſcribes, that is, to declare upon a ſeiſin, infra trigint. annos ultimo elapſos, but where it is of the ſeiſin of the Anceſtoꝛ, there to declare upon a ſeiſin, infra ſexagint. annos, ultimo elapſos, and this being not ſo obſerved by him, is an erꝛoꝛ unanſwerable, and ths is ſo adjudged in point. Coke. 4 pa. fo. 12. in Bervils caſe, that in a writ of right bꝛought upon a mans own ſeiſin, he ought foꝛ to declare upon a ſeiſin infra trigint. annos ultimo elapſos, and ſo was it adjudged in my time, in the Court of C. B. and this is ſo touched in Bevils caſe, and becauſe he hath not ſo done here in this caſe, this is cleerely erꝛoꝛ. Flemming chief Iuſtice, Yelverton, and Croke Iuſtices, did all of them agree with Williams Iuſtice herein, and that the ſtatute of 32. H. 8. cap. 2. is to the ſame effect, as hath been obſerved,—And ſo the whole Court ſeemed to be all of them cleere of opinion that the Judgement ſo given at Durham was erroneous, but the reverſall of the Judgement was not pꝛonounced, the opinion of the Court being declared, the parties ended the ſame between themſelves, without further moving of the Court herein.

Coke. 4. pa. fo. 12. in Bevils caſe.

the Judgement erronious &.

## *William Heywood* Plaintiffe, againſt *Samuel Smith* Defendant, entered Mich. 7. Iac. B. R. Rott. 131.

An action of treſpas and Ejectment &.

IN an action of treſpas and ejectment, upon Non culp. pleaded, aſpectall verdict was found, and upon the verdict, the caſe appeared to be this; Tenant in tayle, the remainder in tayle, the remainder to the right heires of Tenant in tayl, tenant in tayle bargaines, and ſels the land, and after levies a fine to the Bargainee with pꝛoclamations, with warranty, and dyes, the Barganee makes a feoffement over, this warranty diſcends upon the remaynder man, and whether this warranty ſhall bꝛre him, was the queſtion, ſee the caſe at large upon the ſpeciall verdict. Coke 10. pa. fo. 95. &. 96. Edward Seymors caſe. Croke Iuſtice, that Judgement ought to be given in this caſe foꝛ the Defendant. Firſt, it is here to be conſidered what is wꝛought by this fyne here, and whether there be any Diſcontinuance in this caſe,

1. and this is the gꝛeat knot of the caſe, firſt if there be any diſcontinuance here, as to this, the fyne here doth not woꝛke any diſcontinuance, and that foꝛ this reaſon, when tenant in tayle makes a bargaine and ſale, and the deed is inrolled, by this all the eſtate which he lawfully had in him, ſhall be by this devеſted out of him, but no more, and untill Inꝛolement, nothing doth paſſe, 6. moneths paſſed befoꝛe the Inrolment, hither unto no Diſcontinuance, the Bargainee by foꝛce of this enters, and was thereof ſeiſed, then comes the fyne, which is no moꝛe but a feoffement of recoꝛd, this fynes, is but a releas of his right with warranty, if the Tenant in tayle makes a leaſe foꝛ yeeres, & afterwards grants here the reverſion by fyne, this is a Diſcontinuance, foꝛ he hath the fꝛeehold, but if he make a leaſe foꝛ life, and after grants the reverſion by fyne, this is no Diſcontinuance, unleſſe executed. See foꝛ this Littleton in his chapter of Diſcontinuance fo. 138. placito 609. &. fo. 139. 2. As to the warranty, what is here wrought by the ſame, being fallen upon the heire in tayle, as to this,

this, a warranty doth alwayes follow the eſtate, unto which it is annex'd, and if the eſtate to which the warranty is annexed, be determined, the warranty alſo, ſhall be gone and be determined, as appears by Littleton in his chapter of warranty fo. 168. pla. 738. and 739. and therefore if a leaſe for life be made to one, with warranty to him, and his heires, if he be vouched by reaſon of this warranty, he ſhall only recover, according to his eſtate for life, for where the eſtate is determined, to which the warranty is annexed, if this eſtate be determined, the warranty is gone, and at an end; ſo here in this caſe, the warranty was knitt unto a baſe fee ſimple—quamdiu, and this determines the warranty, and with the determination of the eſtate unto which the warranty is determined, gone, and of no force. 3. As to the fyne, ſo called quia finem litibus imponit, this is the moſt ancient, and ſtrongeſt aſſurance in the law, next unto a recovery, in a writ of right, this ſhall be a barre to the heires of that eſtate, a Collaterall warranty, ſhall binde the right, but gives no eſtate, if a leaſe for life be made, the remainder for life, a Collaterall warranty is annexed unto the eſtate for life, this ſhall be determined, with the ſame eſtate, and ſhall have no longer Continuance, ſo that here in this caſe, there is no Diſcontinuance, and the collaterall warranty here, is no barre, becauſe the eſtate to which the ſame is annexed, is determined, and therefore in this caſe Judgement ought to given for the Defendant. Williams Iuſtice, The queſtion here is, whether there be any Diſcontinuance, by this bargaine, and ſayle, and the fyne upon it, with warranty, this is the great, and ſole queſtion, the entry here of the Defendant, is lawfull, and Judgement ought to be given for him. It is firſt to be conſidered in this caſe, quid operatur, by the bargayne, and ſayle, ceſty and uſe, cannot grant, all his eſtate, at the Common law, by the ſtatute of 27. H. 8. capite 10. of uſes, ceſty and uſe, in tayle, bargaynes, and ſells, and levyes a fyne alſo, nothing doth paſſe by this, but what he could lawfully paſſe, this is a ſure rule at the common law, and ſo is Littleton in his chapter of Diſcontinuance fo. 136. pla. 598. and 600. & fo. 137. placito 608. that nothing doth paſſe by the grant, releaſe, or confirmation of Tenant in tayle, and that which he might right fully paſſe, without hurt, or damage to other perſons, having right after his deceaſe, and there is no authoritie in law againſt this, and the ſtatute doth not give him any authority for to do wrong, but he may grant his own eſtate which is for his own life, and ſo is, Littleton placito 608. as to the bargayne and ſayle here, be it by Tenant in tayle, or by Tenant in fee ſimple, nothing doth paſſe by the ſtatute of 27. H. 8. cap. 16. of Inrolments before the deed be Inrolled, within Six moneths, or nothing at all ſhall paſſe thereby, but when the Inrolement comes in due time, it ſhall then, by way of Relation, be ſayd to be in the barganee, from the beginning, the act of Parliament gives no power or authoritie to the Tenant in tayle, to do any wrong or prejudice, to his iſſue, and therefore, if Tenant in tayle do bargayne, and ſell his land intayled, and before Inrolment of the deed, he levyes a fyne, this ſhall work a Diſcontinuance, becauſe he takes here by the fyne. Rents and Commons at the Common law, the law did not create them, but they were created, by the witt of man, and this bargayne, and ſale, may fitly be compared, to Rents, and Commons, the Rule of law is que perſpicue veræ ſunt, non egent probationes If Tenant in tayle be of a Rent, to him, and to the heires of his body, the wife is endowable of this. The fine here in this caſe was Levied after the bargayne and ſale was perfected, it is now to be conſidered, quid operatur by this fyne, as to this, nothing is wrought by it, the ſame being onely, a Corroboration, and a Confirmation of the bargayne and ſayle, and to no other purpoſe ſhall this fine enure, and as to the warranty, the ſame here ſhall be in the nature of a releas, but if no eſtate had been precedent, then he ſhould have taken by the fine, for that this is a teoſfement of record, but where there is an eſtate precedent, there the fine doth operate no further, then as a Confirmation, and Corroboration of the ſame eſtate, but where there is no precedent eſtate, then the fine makes a Diſcontinuance, but not otherwiſe, if a fine be levied unto two, and to the heires of one of them, they have an eſtate in Common, a fine is to operate according to the eſtate. As to the warranty here, this

Littleton fo. 168. pla. 738. 739.

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Littleton Diſcontinuance fo. 136. pla. 598 & 600. fo 137. pla. 608.

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shall have no greater force then the fine, this shall not be extended any further, but be guided by the Estate to which it is tyed, and the estate, by this shall never be inlarged, for a warranty shall never inlarge an estate, but may strengthen the same, if one comes in by way of escheate, there he shall not have the benefit, of a warranty, because he is in by title, but if he come in by way of estate, there he shall have benefit of the warranty, because that so this warranty doth run with the estate, & so if one comes in, in the per, or in the post, he shal have benefit of the warranty, in 39. El. in the C.B. in a case between Jennings & Jennings, where Tenant in tayle made a Lease for 3. lives with warranty, according to the statute of 32. H. 8. capite. 28. the remaynder to his brother in tayle, the benefit of this warranty shall come unto the brother, as it was there ruled and then this warranty shall make no Discontinuance, neither shall the act of Parliament, do wrong unto any one. If Tenant in tayle makes a lease for life, and an Ancestor collaterall releases to him with warranty, this shall work no Discontinuance, for that this collaterall warranty here shall goe no further, then the estate, to which it is tyed, here in this principall case, nothing doth passe, by the bargayne, and sayle, but a base fee simple, and here is no Discontinuance in this case, the Defendant here claymes, under a good title, and so Judgement ought to be given for him. Yelverton Iustice accordingly that Judgement ought to be given for the Defendant. In this case it is first to be considered, what estate doth here passe unto the bargance. 2. quid operatur by the fine, and 3. quid operatur by the warranty, as to the 2. first questions, they are in some clearenesse, but all the question and difficulty is in the last. As to the first (s) the bargayne and sale, this makes no Discontinuance, and this is very cleare, and playne also, the fyne subsequent shall work no Discontinuance, for that is levied upon the same possession which the barganee had, and a fine, which operates upon the possession, shall not alter the possession, upon which it workes, and this is a sure ground in law. It cannot operate by way of estoppell, and so is 6. R. 2. Fitz. title estoppell, placito. 211. and although there are words contrary, in the fine, yet the same shall enure upon the estate precedent, and not otherwise, here in this case, the fine shall enure, as a release, and confirmation, because it enures upon the estate precedent. In the next place, as to the warranty, the remaynder here continues, in the same estate, as it was, and this fine here is no barre to the heire in remaynder, the remaynder continuing in him, to whom it was limitted. If a man makes a leale for life to one, the remainder over in fee, Tenant for life grants his estate to another, to whom an ancestor collaterall of him in remaynder, doth releas with warranty, this release doth not inlarge the estate of him, to whom the releas was made, because the reversion did continue as before, as appeares by 33. E. 3. Fitz. title. releas. placito. 42. 41. E. 3. Fitz. title Garrantie placito. 15. 45. E. 3. fo. 21. b. and 1. H. 5. fo. 1. but otherwise it is, if the Tenant for life, had been disseised, and then an ancestor collaterall had released to the disseisor, with warranty, this shall binde, because that the estate for life, and the reversion also, was devested, by the disseisin, at the time of the releas with warranty, as appeares by 21. H. 7. fo. 11. a. for the rule of law is, that where the remaynder is removed and displaced, at the time of the warranty annexed, and before the warranty doth discend, there is no Discontinuance by this, where the same estate doth continue, without alteration, but where this is removed, notwithstanding the particular estate be regayned, yet by this there shall be a discontinuance, but where there is no alteration of the estate, there can be no Discontinuance, a second reason that this is no Discontinuance, because that he is in of an other estate, then that unto which the warranty was annexed, and therefore the same can worke no Discontinuance, neither shall he have any benefit of the warranty, and this appeareth by 22. the booke of Assises. placito. 37 that a man shall not have any benefit of the warranty, if he be not in, under the same estate to which the warranty was annexed, and where an estate is made with warranty, if once defeated, is gone, as appeares by Lit. in his chap. of Garrantie fo. 169. pl. 741. Also a warranty, shall never enlarge an estate, but the same is alwayes to go with the estate, and

39. Eliz. C.B. Jennings against Jennings.

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33 E. 3. Fitz. title Release pla. 42 41. E. 3 Fitz title Garrantie pla. 15. 45 E. 3. fo. 21 & 1. H. 5. fo. 1.

22. Assises pla. 37.

Littleton cha. of Garrantie fo. 169. pla. 741.

and ſhall be accoꝛding to the eſtate, to which it is annexed, and ſhall determine with the ſame, and ſo is 2. H. 4. fo. 13. the difference will be, where the warranty is confyned unto an eſtate, and where not, but is of a higher nature, where it is confined to an eſtate, the ſame ſhall not go any further then the eſtate, to which it is confined, and ſo is 46. E. 3. fo. 4. Placito 11. If a man makes a feoffement in fee to one and his heires with warranty, the ſecond feoffee ſhall take benefit of his warranty, but where a leaſe foꝛ life only is made, with warranty to him and his heires, the aſſignee ſhall have no benefit of this warranty, foꝛ the reaſon beforꝛe expreſſed. As to the other matter moved, whether this warranty here in this caſe ſhall be a bar oꝛ not, foꝛ to bar the remainder man, the ſpeciall verdict ought to have found this upon the Book of 7. H. 5. fo. 6. that a Jury by their verdict at large, ſhall not finde a collaterall warranty, here the warranty is not pleaded, and ſo therefoꝛe the Jury cannot finde it, and upon the whole matter concluded that Judgement ought to be given foꝛ the Defendant. Fenner Juſtice accoꝛdingant, that Judgement in this caſe ought to be given foꝛ the Defendant, here in the Deviſe, it is not found that the Land was Socage Land, and where a man will convey fee ſimple land, accoꝛding to the the Statute of 32. H. 8. cap. 28. he ought ſpecially foꝛ to ſhew this, Agreed in all the other points, with the reſt of the Judges, and concluded that Judgement ought to be given foꝛ the Defendant. Yelverton Juſtice, in anſwer to that which was alledged by Fenner Juſtice, becauſe it is not ſhewed to be Socage Land, this need not ſo to be in this caſe, foꝛ that this was a houſe in London, and ſo the ſame well deviſable by the common Law and cuſtome. Flemming chief Juſtice, here he was ſeiſed of this houſe in London, which was deviſable by the cuſtome, and this being in London, ſhall well paſſe by deviſe, by the cuſtome, without the aid of the Statute, but otherwiſe it is, if it were in another place, and not in London, but being in London, and held in capite, it ſhall paſſe by deviſe, by the cuſtome, without finding of this to be accoꝛding to the ſtatute of 32. H. 8. cap. 28. foꝛ Deviſes. The firſt point here conſiderable is, whether the entrie of Thomas Cheney the heire of the remainder man, be lawfull oꝛ not, it is cleere, that here is nothing but the Warranty to take away his entrie, and if this doth not take it away, then is his entrie lawfull, if no warranty were in the caſe, then cleerely, and without any queſtion, his entrie had been lawfull. As to the bargain and ſale here made by Tenant in taile, cleerely this is no diſcontinuance, foꝛ that Tenant in taile by grant, and without livery, can never make a diſcontinuance, foꝛ this bargain and ſale here doth not carry a moꝛe ample and large eſtate, but ſuch as the Tenant in taile hath in him to paſſe, and this is but during his life, but this is ſo far, and in ſuch manner out of him, as that he cannot puniſh, oꝛ controule the Bargainee, by any action of waſte, as appears by Littleton Title Diſcontinuance placito 650. the heire of the Bargainee, ſhall have a baſe fee diſcendible. and ſuch a fee, of which his wife ſhall be endowed, and dowable, not againſt the iſſue in taile, but againſt the heire of the Bargainee, the wife of the Bargainee ſhall be dowable. So that this is cleere, that by this bargain and ſale, no diſcontinuance is wꝛought thereby. The next matter to be here conſidered, is touching this fine, and to ſee quid operatur, by this fine, and whether by this fine, the remainder of John Cheney be drawn out of him, and ſo turned into a right oꝛ not, as to this, the ſame is not turned into a right, but if they all do die, notwithſtanding any thing which hath been done, this ſhall deſcend unto him in poſſeſſion. In the next place, as to the watranty & quid operatur by this, the nature of this is, to binde the poſſeſſion of him, oꝛ of them, from whom this doth come, but not to binde thoſe which have the poſſeſſion, the poſſeſſion of others, it ſhall not binde, but the right only (if he have a right) and ſo cleerely, notwithſtanding all this, there is no diſcontinuance in the caſe. This fine here doth barre the intaile, and all the iſſues of his body, but it doth not barre others, if there be iſſue and aſſets, there the fine will be a bar as to the warranty, if Tenant in Taile makes a bargaine and ſale, and afterwards enters upon the bargainee, and makes a Feoffement to another, and dies, this is not a diſcontinuance of the State Taile, becauſe

Note the difference.

63. E. 3. fo. 4. pla. 11.

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Littleton title Diſcontinuance placito. 6503.

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becauſe he was not then ſeiſed, by force of the tayle, but by diſſeiſin, and if the entry and feoffement here ſhall not make a Diſcontinuance, à fortiori the fine here ſhall make no diſcontinuance, ſo that nothing is here wrought by this fine but onely thereby a barre to Henry Cheney, that levied the fine, and to the heires of his body, and to this eſtate here, there is a warranty knitt, the warranty is knitt to this eſtate, and before this doth diſcend, the remaynder is removed, and he hath onely a right, the proper nature of a warranty, is to be knitt unto an eſtate, and where there is any alteration of the remaynder, it is then to be conſidered how far this ſhall be a barre; it appeares by Littleton in his Chapter of Garrantie, placito 739. and with this agrees all the Bookes that a warranty being annexed unto an Eſtate, doth determine with the Eſtate unto which it is annexed, here in this caſe a lineal warranty is knitt to the firſt eſtate, and a collateral warranty, unto the remaynder, a warranty ſhall never be extended for to enlarge an eſtate, or to be of force, any longer, then the eſtate to which it is annexed, ſhall have continuance, and the warranty here goeth no further, but to the eſtate given by the fine, if a man have an eſtate with warranty, and he aliens this, the warranty by this is gone, and determined, and ſhall not goe to his aſſignee, for ſeparate the eſtate, to which the warranty is annexed, and the warranty is gone, if the warranty be annexed unto his poſſeſſions, if an other comes in, in the poſt, the warranty ſhall not barre him, by 7. E. 3 pla. 34. & 46. E. 3. fo. 4. if a man makes a gift in tayle, and warrants the land to him his heires, aſſignes, the Tenant in taile makes a feoffement in fee, and dyes, in a Formedon in reverter he ſhall rebut the doner by force of this warranty, (the which is good law, being intended of a gift in taile before the Statute of weſtminſter. 2. cap 1. de donis conditionalibus, for that then the warranty was annexed unto an eſtate, in fee ſimple, and the donor, had onely a poſſibilitie of reverter, the which may well be barred, by a Collaterall warranty. 45 E. 3. fo. 21. b. Tenant in tayle with warranty, makes a leaſe for life, this is onely a Diſcontinuance for life, if an auncеſter collaterall of the Tenant in tayle releaſes to the Tenant for life with warranty, and dyes, and the Tenant for life dyes, this warranty ſhall not barre, but otherwiſe it is, if the Tenant for life be diſſeiſed, and then a Collaterall anceſtor doth releas with warranty, becauſe the eſtate was Diſcontinued. It is in the next to be conſidered here, whether the warranty in this principall caſe, ſhall be extended unto the eſtate in fee ſimple made by the feoffement, cleerely it ſhall not. If the Feoffee be vouched, what eſtate ſhall he recover, he ſhall recover no more in value, then according to the eſtate, to which the warranty was annexed, and no more then he ſhall recover, by reaſon of this warranty, no further ſhall be barred by reaſon of the ſame, and then, when the eſtate, to which the warranty is annexed, is avoyded, the warranty alſo ſhall be at an end, and the right revived. As to the laſt matter conſiderable in this caſe, this is onely found by verdict, and not pleaded, if the collaterall warranty here in this caſe, ſhall binde the remaynder man, the ſame ſhall then barre, though not pleaded, for the rule of law is, that in ſuch actions in which one cannot plead, there the matter to be pleaded ſhall be found by verdict, and this is well, but where the party may plead, there the ſame is to be pleaded by him. In an Ejectione firme and action of treſpas, and in an action upon the ſtatute of 5. R. 2. cap. 7. a warranty is not to be pleaded, the nature of a warranty, and to have benefit thereby, is to be by way of voucher, and Rebutter in a reall action, and by no other way, can a man have benefit of a warranty, a warranty is to be alwayes ſaved, for the benefit of the partie, and the ſame is not to be overthrowne, where a man hath a warranty, and is impleaded, in a reall action, and he hath a way and meanes, to have advantage by the warranty, but he doth omit the ſame, he by this his laches, ſhall loſe the benefit of the ſame for ever after, but if it be in any other action, where he cannot plead this warranty, as in an ejectione firme, and other perſonal actions, a Collaterall warranty cannot be pleaded by way of barre, but though he cannot plead the ſame in theſe caſes, yet he ſhall have benefit of this Warranty, without pleading of the ſame, and that in this manner, by his giving of the ſame in evidence to a IURY, and the ſame

Littleton cha. Garrantie pla. 739.

Statute of Weſtminſter the ſecond cap. 1. de donis conditionalibus.

6.

As touching the pleading of a warranty, where to be pleaded, and where not.

Note the difference where in a reall, and where in a perſonall action.

ſame is to be found by the verdict of the Jury, and this is very cleere by many Authorities, as by 3. E. 4. fo. 4. b. &. 5. a. 1. H. 7. fo. 12. a. b. 20. H. 7. fo. 4. a. 21. H. 7. fo. 32. a. b. 27. H. 8. fo. 22. b. & fo. 23. ſo that a collaterall warrantie may well be given in evidence, and found by the Jury upon Non culp. pleaded in an ajectione firme, and ſo upon the whole matter, be concluded with the reſt of the Judges, that judgement in this caſe ought to be given for the Defendant. Nota, that Yelverton Juſtice in his argument did ſome what doubt of this laſt matter, becauſe they had not pleaded the warranty, but this was only found by the Jury, by the ſpeciall verdict, and he grounded his doubt upon the Book of 7. E. 3. before remembred. But Flemming chief Juſtice cleere of opinion in this to the contrary, and that upon the difference before taken, where the ſame was in a reall Action, where he may plead this warranty, and where in a perſonall action, where he cannot plead, and if it ſhould be otherwiſe, then all would flee and reſert unto reall actions, but the nature of this warranty is ſuch, that the right of it in ſuch Actions in which it cannot be pleaded, that the ſame ſhall alwayes be ſaved, for the benefit of the partie. And ſoby the whole Court, Nullo contradicente, Judgement was given and entred by the Rule of the Court for the Defendant, quod nota.

7. E. 3.

Judgemene given by the Court for the Defendant.

## *Clarke* Plaintiffe againſt *Gurnell* Defendant, entered Paſch. 8. Iac. B. R. Rot. 530.

IN a writ of Error for to reverſe a Judgement given in the C. B. in an Action of Covenant, wherein the caſe appeared to be this: the Plaintiff there did Covenant agree 7. Iac. to let a Ship a fraught, to one Boothby, and that the ſaid Ship, with the firſt wind that ſhould happen, ſhould ſaile out of the Ile of Line, to ſuch a place, &c. and Clarke covenanted for Boothby, that he for the Fraught of all the premiſes, would pay unto the Plaintiff Gurnell the ſumme of 184. l. pro. tota transfretraione omnium premiſſarum, &c. for this money the Action was brought in the *C.* B. and a judgement there had againſt Clarke for the ſame, upon which judgement a Writ of error is brought. Hen. Yelverton for the Plaintiff in the writ of error, that the judgement there given is erroneous, and to be reverſed, and for error alledged, that the Declaration is not good, becauſe it is not laid therein, that the Ship came thither, and the Covenant for the payment of the money, doth depend upon the other Covenant, concerning the Ship, the Plaintiff by his Declaration, doth not well intitle himſelf to have his Action, it appears by 18. H. 6. fo. by Fortiſcue, if one do covenant with another to be his Steward for ſo much wages, in an Action by him brought for his wages in this Court, he ought to ſurmiſe and ſet forth, that he hath performed his ſervice, which doth intitle him to his Action: and ſo here in this caſe, he ought to ſhew that he had taken in the fraight, and performed what on his part ought to be performed: here in this caſe the Covenant is entire: it appeareth in 6. E. 6. Dyer fo. 76. pla. 29. & 30. that the word (pro) makes a contract to be conditionall, as pro maritagio habend. a man doth covenant for to make an eſtate, if the marriage take not effect, the Covenant is diſcharged. So in an Annuitie granted pro conſilio impendend. ſtop the Counſell, and the Annuitie is gone, ſo if a man grant to another, a way over his Land, & pro chimino illo, the other grants to him a rent-charge, if the way be ſtopt, the rent-charge is gone: ſo that (pro) makes a condition, and this is all one, as if it had been in conſideratione inde 15. H. 7. fo. 10. b. If a man doth Covenant to ſerve another for a year, and he doth covenant to give him ſo much for his years ſervice, if he will bring an Action for his money, he ought to ſhew that he hath ſerved him, and ſo in the principall caſe here, the Plaintiff before

*A* writ of error for to reverſe a Judgement &c.

18. H. 6. fo. 1. pro Forteſcue.

before he can recover the money, ought to shew performance of that which was to have been done, of his parte, the which is not here done, and so for this defect and omission in the Declaration, the same is not good, and so consequently, the Judgement for this cause is erroneous, and ought to be reversed. Geo. Croke, That the Judgement is not erroneous, but was well given. The Covenant here, was to pay so much, (pro transfretatione omnium premissarum, though he do not goe, yet he is to have his pay, and to this purpose is the case in 48. E. 3. fo. 2. b. &, 3. A. where one did Covenant to serve another in the warres in France, with so many esquires at armes, and he did Covenant and promise to pay him so much for the same, an action of Debt was there brought for the money, it was there alleadged, that he ought to have shewed performance of the service, but ruled that he need not so to do, but the Judgement there was a respondes ouster; notwithstanding the sayd exception, and with this agrees Coke. 7. pars fo. 9. &. 10. Vghtreads case. It appeareth by the booke of 3. H. 6. fo. 33. b. 34. A. if a man do promise another 20. l a yeere for to be of his Councell such a day, and yeere, for two yeeres next ensuing. In an action brought for his money, he ought to shew in his Count, that he was with him, and did give him Counsell, for this is that, which is the first cause of the dutie, but if it were a promise to pay so much, upon the promise of the other, for to do such a thing, there in this case it is a promise, against a promise, and the one of them may have his remedy, by way of action for the money, and the other his action for breach of promise, 10. Eliz. Dyer. fo. 270. placito. 23. where the office of the steward of a Manno; was granted to one, & a rent charge granted to him 'pro excercitione, & occupatione officii illius there it is a Quære, whether he shall not be charged, in the pursuing of his remedy for the rent, to shew that he had exercised the office for that if he have not this done, the Annuity, and Rent is determined and made not destrainable; this agrees with 3. H. 6. fo. 23. but both these do differ from the case here in question, for here in this case, it is one Covenant against another, and so the Judgement is well given, and not erroneous, and so to be affirmed. Yelverton Iustice, where the payment is to be made upon performance of a matter precedent, there the partie, is to alledge performance of the matter, before he can maintayne an action, for to recover the money, but otherwise it is, where the matter to be performed is subsequent to the payment, and Vghtreads case Coke 7. pa. fo. 9. &. 10. is good law, and nothing at all against this, the case before remembered in 6. E. 6. Dyer fo. 76. pro maritagio, one covenants for to make an estate, this (pro) makes a condition, and is matter precedent, the performance of which ought first to be layd down, before the estate covenanted to be made for this, can be obtayned the principall case here, is not like the case, where there is one promise made against another, there they ought to have their severall actions, upon the severall promises, the one against the other, but it is not so in the case here, for before he can here have the money covenanted to be payed, (pro transfretatione, &c. he must expresly lay the performance of that which was to be done on his part, being matter precedent to the payment, which is the preparation, and setting forth of the shipp, the which is not heze so done, and for this omission the declaration not good, and so the Judgement not well given, but is erzonious, and ought to be revezsed. Flemming chiefe Iustice. If the Coventnt were, that he should take all the wares into the shipp, and so to transport them, & then the other, doth promise and Covenant for to pay him so much for the same, or doth Covenant that when he retorns to London to pay him so much for the same, here of necessitie he ought to shew his taking in of the wares and the transportation and his retorne before he can recover the money against the, other and this he hath here failed to do in his Declaration, and so the Declaration for this defect is not good, and for this cause the Judgement is erzonious, and to be reversed. Williams Justice, this difference may be taken, here they are not, as severall covenants, and so one against another, but they are here, as Concomitantia. If the one doth Covenant for to transport goods from place to place, and the other covenants to pay so much for the same, these are severall covenants, and the one may well have his action against

Coke 7. pa. fo. 9. 10. vghtreds case.

Coke 7. pa. fo. 9. 10. Vghtreds case.

6. E. 6. Dyer. fo. 76.

the

the other meerely upon the Covenant, and for breach of the same, but in the principall case here, there is matter precedent to be done to intitle the partie, to have the money covenanted to be paid, and that is the preparing of the Ship, the lading of the goods into the Ship, and the transporting of them, &c. and then for all this, the money covenanted to be paid, the which he cannot recover, before performance of the former part to be done by him, and this he ought to have alledged in his Declaration which he hath not done, and so the Declaration not good, and the judgement erroneous, but the Court not being full, the reversall of the judgement was not pronounced, but the same was adjourned to another time, though the opinion of the three Judges was, that the Declaration was not good, and so the judgement erroneous.

the Judgement erroneous by the opinion of three Judges.

## *Mary Moore* Plaintiffe against *Gerrard Moore* Defendant.

IN an Action upon the case for a Promise, upon Non assumpsit pleaded, a Verdict was found for the plaintiff, and the case appeared to be this, one at the request of the Defendant, and for him (but with the parties own money) did buy certains Wares and Commodities, the which were for him transported into Ireland, and the Defendant at whose request this was done, did assume and promise for to repay the money, so by him to be laid out, for non-payment whereof the Action was brought and found for the Plaintiff. Dodderidge the Kings Sergeant moved for the Defendant in arrest of judgement, that the Declaration here was not good, because he doth not therein averre, that these goods by him thus bought, did ever come to the use of the Defendant, the matter only here considerable is, when the Plaintiffe did buy Wares at the request of the Defendant, and for him, and he promising to repay him the money laid out, whether this do transferre any propertie to the Defendant or not, and whether the propertie remaines in him who bought them, that the propertie doth still remain in him, he ought also to have averred further in his Declaration, that when the goods were delivered to him, that he then promised for to repay the money, and for this omission, the Declaration is defective, and for this cause judgement ought for to be arrested. Williams Justice, if the case had been that you do promise, that such moneyes as the Plaintif shall lay forth, and disburse, for such goods for you, to be transported into Ireland for you, you do assume, and promise to pay the same, is not this a good promise, and upon good consideration, cleerely it is, and gives a good cause of Action to the Plaintiff, if the money be not paid. Yelverton Justice, if I do request one for to buy such a Gelding for me, and do promise that I will repay him again, and he buyes this Gelding for me accordingly, cleerely he may well have an Action upon the case against me for this money upon my promise, and I may take the Gelding, and before my takeing of him, the propertie of the Gelding, is not in him, who bought him to my use, but the propertie is in me, who requested him to buy the Gelding for me, quad tota Curia concessit, so here in this case there was a promise for to repay all such moneyes as should be disbursed for him, for certain Merchandises to be transported into Ireland, for not payment of which moneys, the Action here is well brought against him, and the Declaration is good, and so Judgement ought, according to the Verdict, to be given for the Plaintiffe. The whole Court agreed in this, that this is a cleere case for the Plaintiff, that the Defendant ought for to repay this money, notwithstanding the goods were not bought with his proper money, and that the Plaintif here hath just cause of Action, that the Declaration is good, and judgement to be given for the Plaintiff.

An action upon the case for breach of promise &c.

Note, that the Councell for the Plaintiff informed the Court, that the Plaintiff was in forma pauperis, and therefore prayed that the Plaintif might not pay the box, because, as it was alledged, the Plain. was not worth so much as to pay the box.

Nota, le difference touching a forma pauperis.

Judgement given per curiam, &c.

Williams Justice, you ought to pay the Box, this notwithstanding, and the difference is this, where you do recover, there you are to pay the Box, though you sue in forma pauperis, otherwise where it goes against you: the whole Court were cleere of opinion, that the Declaration here is good, that the Plaintiffe hath just cause of action, and therefore the rule of the Court was, quod intretur judicium pro querente, and the Box paid.

## *Skipwith* Plaintiff against —— the Inne-keeper.

Skipwiths case, in a Trover and conversion.

IN a Trover and Conversion: The Case appeared to be this; A stranger comes to an Inne with my horse, and there leaves him to stand at hay, unknown to the owner, the Horse there eats out his price and value, the partie which left him there, comes not to pay for him: afterwards the true owner of the Horse hearing of him, comes to the Inne, and there finding of his Horse, demands him of the Innekeeper, who refused to deliver him, unlesse the money there owing for him was paid, the question moved to the Court was this, how the Innekeeper should come to his money, and whether in this case he may retaine the Horse, untill he be paid and discharged for his meat, in regard, that he which left the Horse there, was not the true owner of the Horse: the Court in this case were divided by the opinion of two of the Judges, the Inne-keeper here may well retain and keep the horse till he be satisfied the money there owing to him for his meat, and by two other of the Judges, that he could not retaine and keep the Horse from the true owner, for his meat, being not left there by him, but by a stranger unknown to him. Williams Justice, & Croke Justice both of opinion cleerely, that the Innekeeper may retain and keep him for his meat, till he be paid, and satisfied for the same, for that the Inne-keeper here is not bound to take knowledge of the true owner of this Horse, thus left to stand in his Inne at Hay by another. Yelverton Iustice, and Fenner, Justice held the contrary, that in this case the Inne-keeper can not retain and keep the Horse from the right owner, coming thither and demanding of him, till he be paid for his meat, being left there by a stranger, unknown to the right owner, but that he must have his remedie against the partie which left the Horse there, and of him (or of no body) have his satisfaction for the time that the Horse continued there. Flemming chief Justice was absent, and so the Court remained divided in this case, and no more said in it, the parties afterwards agreed.

Ended by an agrement between the parties.

A man bound to appear in B. R. before the day, &c.

Note, that one was bound by Flemming chief Justice for to appear in B. R. Croke moved the Court for to have his appearance respited, in regard that he was arrested in the interim, at the suit of another, and imprisoned, so that he could not appear. Williams Justice, if a man be bound by a Recognisance for to appear in a Court of Record, if before the day of his appearance, he is arrested at the suit of the King, and before the day of his appearance he is imprisoned, this shall discharge his Recognisance, but if he be arrested at the suit of another, and imprisoned by reason of which he cannot keep his day, he by this hath broken his Recognisance, and this is the difference to be observed for good law. The whole Court in this case did seem to incline, that in this case he should be discharged, because that he was before the day, arrested and imprisoned, so that it was not in his power for to appear. Williams Justice, he might have entred bail upon the second arrest, and imprisonment, and so to have enlarged himself, and appeared; the rest of the Judges against him herein that by reason of his imprisonment he is to be discharged of his appearance, see Littleton in his Chap. of Continuall claim pla. 436, 437, & 438. where imprisonment shall excuse appearance for to make a continuall claim, and shall avoid a discent, or an utlagarie, if he be imprisoned at the time.

Note the difference where a Recognisance for appearance shal be forfeited and where not.

Note,

Note, that in a Writ of Error for to reverse a judgement given, the Error assigned was, that an infant appearing by his Gardian, and coming to his full age, did continue still by his Gardian, whereas he then should have been by his Attorney, and judgement was so given for him, and to reverse the Judgement, this was assigned for error. Williams Justice, and the whole Court clerely that this is no error, but that the judgement ought to be affirmed, for the Judges ought not to take notice, when he comes to his full age, and therefore by the rule of the whole Court, the Iudgement was affirmed.

Infant appears by Gardian,&c.

Judgement affirmed per curiam.

## *Armitage* Plaintiffe against *Dison* Defendant.

IN an Action upon the Case for a promise to pay, &c. the Plaintiff declares of divers sums disbursed for the Defendant, quæ quidem summe in toto se attingunt, to the summe of 23. l. whereas it was but 20. l. upon the Non assumpsit pleaded, a verdict was given for the Plaintif, and this matter of the miscasting was moved in arrest of judgement. It was urged for the Plaintiff, that this being but only a mistake in the casting up, is to be amended, and so was it held in one Gaughtons case a Dyer here in this Court, who sold divers pieces of Cloth, and for every piece he was to have so much, who brought his Action upon the Case, for the said summe, and it was found for him, and in casting up of the summe, there was the like mistake, this was moved in arrest of Judgement, but it was overruled, and by the rule of the Court, the same was amended. Williams Iustice, I was of councell in the said cause of the Dyer, which case was, as it was cited and adjudged for to be amended, the like case was here in this Court, a Case of a Rent of 39. s. due, and he to whom the same was due, did demand 3. l. it was here held that he ought to have tendred the 39. s. and for that the same was not tendred, this was here adjudged for to be a forfeiture, and that the other may enter for the same, in regard that he demanding of 3. l. in this is included a demand of the 39. s. so if a man be indebted to me in 20. l. and I bring an Action for 30. l. I shall recover my 20. l. Williams Justice and the whole Court in this Principall case, the mistake in the casting up, is to be amended, according to the true casting up, and so by the rule of the Court, the summe was amended.

An action upon the case for a promise,&c.

Gaughtons' case a Dyer in B. R.

The mistake amended.

## *Pothill* Plaintif against *May* Defendant.

IN a Prohibition, the case was, the Defendant being Parson of D. did libell in the Spirituall Court for Tithes for Silva cedua, and for the Herbage for depasturing of his Geldings, the Plaintif there shewed, that they were his Hackney Geldings which he kept for his pleasure, and for himself, and his servants to ride upon, being his saddle Horses: and this plea being there refused, for this cause he prayed a Prohibition, the whole Court were cleere of opinion, that here was good cause for a Prohibition, for that these Horses are not titheable, nor any tith Herbage is to be paid for them, otherwise it were, if they had been Cart-horses, which he had to till his ground, or for Cattell bought, and fatted to sell again for gain, for these he ought to be answerable to the Parson for the Herbage of them, but not for the Herbage for his Geldings by him kept, and used only for his pleasure, but it was for working horses, for the Cart or Plow, or for fat cattell, bought and fatted to sell again, of such Cattell allowance is to be made for their Herbage, because that a Profit doth come in by them, but otherwise it is of saddle horses, the whole Court agreed in this, and therefore in this case, by rule of the Court, a Prohibition is granted.

A prohibition granted, &c.

A prohibition granted.

## *Daby* Plaintif againſt *Holbrooke* Defendant.

A writ of error to reverſe a Judgement &c.

IN a writ of erꝛoꝛ foꝛ to reveꝛſe a Judgement giveꝛ againſt the Plaintiffe, being an infant, the erꝛoꝛ aſſigned and inſiſted on was, becauſe that the Judgement giveꝛ againſt him, was quod capiatur, the which ought not ſo to be, upon the booke of Mich. 16. &. 17. Eliz. Dyer fo. 388. placito 41. wheꝛe, if an infant be Plaintiffe by his procheine amy, after his full age, makes an Attuꝛney, and then becomes Nonſuit, he ſhall not be heꝛe amerced of, oꝛ that he is within age, and if ſo, then no Capiatur ought to be awaꝛded, againſt an Infant, and theꝛefoꝛe, this being heꝛe ſo awaꝛded, is a cleeꝛe erꝛoꝛ, and ſo the Judgement erroneous, and foꝛ this erꝛoꝛ to be reverſed. Williams Iuſtice, a Judgement quod capiatur, ought not to be giveꝛ againſt an Infant, foꝛ that an infant is not to be impriſoned, and theꝛefoꝛe it appeaꝛes by the booke of 14. Aſſ. placito. 17. where an infant was found to be a diſſeiſoꝛ and not impriſoned, becauſe he was within age, and with this agrees 10. Aſſ. placito 1. Brooke title Impriſonment placito 37. 28. Aſſ. placito. 10. Fitz. title Impriſonment placito 27. & Brooke tit. Impriſonment placito 62. &. 38. E. 3. fo. 5. all do agree in this, that an infant ſhall not be impriſoned 43. Aſſ. placito 45. Brooke title impriſonment. placito 75. an infant is found a Diſſeiſoꝛ, ſo that he ought to be impriſoned, he ſhall be pardoned per Curiam quia infant. Paſch. 43. E. 3. Fitz. title Impriſonment placito 16. In an Aſſiſe, it was found foꝛ the Plaintiff, and aꝛjudged that he ſhould recoveꝛ ſeiſin of the land, and that the tenant ſhould be amerced, and taken, but becauſe it appeaꝛed that he was within age, he was neither to be amerced, noꝛ impriſoned, but both of them pardoned, quia infans. 30. Aſſ. placito 18. Fitz. tit. Impriſonment pla. 10. &. Br. tit. Impriſonment pla 46. In an Attaint bꝛought by an infant, which paſſed againſt him, and he was theꝛe aꝛjudged to priſon, and yet an infant, but by. 41 E. 3. Fitz. tit. Impriſonment pla. 17. an Infant Nonſuited in an Attaint, ſhall not be impriſoned, quia infans. 16. Aſſ. placito 7. Fitz. title Impriſonment placito 25. &. Br. title Impriſonment pla. 45. a feme Covert being found a diſſeiſoreſs, with foꝛce and armes, ſhall be impriſoned, but contrary it ſhall be in the caſe of an infant 14. E. 3. fo. 18. Br. tit Impriſonment placito 43. two were found diſſeiſoꝛs with foꝛce and armes, the one of them was an infant but of 18. yeeꝛs of age, and theꝛefoꝛe he was not impriſoned, but the other was, ſo that by theſe authoꝛities it appeaꝛes, that an infant ſhall not be impriſoned, foꝛ any cauſe by his body, and accoꝛding unto, theꝛe are two diꝛect preſidents adiudged in poynt in this Court, as Williams Iuſtice obſeꝛved, that an infant ſhall not be impriſoned by his body, and theꝛefoꝛe in the principall caſe heꝛe, the Judgement giveꝛ againſt an infant—quod capiatur is eꝛꝛoneous Alſo by Williams Iuſtice, a Nobleman foꝛ his contempt ſhall be fined, but theꝛe is no caſe in the law to be ſhewed, foꝛ to warrant this, that the Judgement, againſt an infant ſhould be quod Capiatur, (unleſſe it be onely in caſe of felony) (this excepted) theꝛe is no caſe in the law, foꝛ to warrant this Judgement, heꝛe giveꝛ againſt an infant, quod capiatur: the whole Court did agree with him heꝛein, that this is a cleeꝛe erꝛoꝛ, and theꝛefoꝛe by the Rule of the Court foꝛ this erꝛoꝛ apparant, the Judgement was reverſed.

30. Aſſ. pla. 18. Fitz title. Impriſonment pla. 10. Br. tit. Impriſonment pla 46.

14. E. 3. fo. 18. Brooke tit. Impriſonment placito. 43.

Iudgement reverſed per Curiam.

## *Tut* Plaintif, againſt *Kerton* Defendant.

An action upon the caſe, for words &c.

IN an action upon the caſe foꝛ ſcandalous woꝛds ſpoken by the Defendant of the Plaintiffe, being high Sheꝛiff of his County, and a Juſtice of Peace, the woꝛds were theſe—(s) He—meaning the Plaintiffe, hath couſened the Earle of Hartford

of

of as much as he, ( innuendo the Plaintiffe ) was worth, and layes the ſpeaking of theſe words to be ad dammum 2000. l. upon Non culp. pleaded a verdict was given for the Plaintiffe. It was moved in Arreſt of Judgement that theſe words are not actionable. Yelverton, Croke, Fenner, and Williams Iuſtices, cleerly theſe words are not actionable. Williams Iuſtice, there was a caſe here in this Court adjudged, where an action upon the caſe was brought for words by a Merchant Plaintiffe, for ſcandalous words ſpoken to him, which words were theſe (s) Thou art an arrant knave, for you have Couſened all Coventry, and upon a motion in arreſt of Judgement, it was adjudged by the whole Court here, that theſe words were not actionable, and ſo in the principall caſe here, the Court was cleer of opinion, that the words, are not actionable, and therefore the rule of the court was, quod querens Nil capiat per billam.

Iudgement per Curiam &c.

## *Petty* Plaintif againſt *Waight* Defendant.

IN action upon the caſe for ſcandalous words ſpoken by the Defendant, to the Plaintiffe, which words were theſe (s) Thou art a thiefe, for thou haſt ſtollen my ſheafe of corn, ad—damnum upon Non Culp. pleaded, a verdict was found for the Plaintiffe. It was moved in Arreſt of Iudgment that theſe words are not actionable. The whole Court cleere of opinion, that theſe words are ſcandalous, and actionable, becauſe it was corn lying upon the ground, and ſo if the words had been, thou haſt ſtollen a buſhell of my apples, on the ground, theſe words have been here adjudged to be actionable, otherwiſe it had been, if that he had ſaid my apples out of my orchard, there not actionable, but if the words had been, Thou haſt ſtollen two armefulls of my wood, theſe words are actionabe, and ſo here in this principall caſe, becauſe the corn was made up in ſheafes, and the partie hath a ſpeciall property therein, and therefore this is felony, and for this cauſe theſe words thus here ſpoken to the Plaintiffe, are very ſcandalous, and well actionable, and ſo by the Rule of the Court, Iudgement was entred for the Plaintiffe.

Action upon the caſe for words &c.

Iudgement given by the Court &c.

Nota, that an action of treſpas was brought by the Maſter for an aſſault and battery of his ſervant, the which aſſault and battery was, for giving of him a box on the eare, ad dammum, upon Non culp, pleaded, a verdict was given for the Plaintiffe. It was moved in Arreſt of Iudgement, that the Declaration was not good, for that it is not layd in the Declaration, per quod ſervitium amiſit, by the opinion of the whole Court, the maſter ſhall not recover any damages if his ſervant was not wounded, ſo that by reaſon of this he hath loſt his ſervice, and ſo he ought for to lay it in his Declaration, or the ſame is not good. Williams Iuſtice cited one Glanvils caſe, in an action of treſpas, for an aſſault and battery, which was for giving a box on the eare unto a Knight, and for which he brought his action, and did recover 200. l. damages for this. In the principall caſe here, for the omiſſion of theſe words in the Declaration per quod ſervitium amiſit, the Declaration is not good, and the rule of the Court was, quod querens Nil capiat per billam.

An action of aſſault and battery &c.

Glanvills caſe.

Iudgement. &c.

Nota, by Williams Iuſtice, and agreed by the Court, that if a man do make a joynture by deed unto his wife, during the Coverture, and afterwards of this land the husband and his wife do levie a fyne, yet cleerely, this ſhall be no barre to her from bringing of her writ of dower, but that ſhe may well have this after the death of her husband.

The

## The caſe of the Conſtable of *Stepney*.

Touching the election and chuſing of Conſtables, &c. The caſe of the Conſtable

Nota, that a writ of Reſtitution was prayed, for to reſtore a Conſtable to his place where he was Conſtable being choſen for the ville of Stepny, and ſworn, by the Juſtices of peace, and diſplaced again, of which Mennor the Lord Wentworth was Lord, which Conſtable of his was removed before by the Juſtices of peace at their quarter ſeſſions (and after put in againe by the Lord)—Williams Juſtice. Juſtices of peace, are to elect Conſtables of Hundreds, and alſo high Conſtables, and theſe, as they are to be choſen by them, ſo they are alſo removable by them, if there be cauſe for it, but if it be in a Mannor, and the Conſtable is choſen, and ſworn in the Court Leete, the Juſtices of peace here, have no power, nor authority, for to diſplace him. But they may fyne him, if there be cauſe for it. Yelverton Juſtice agreed with him herein, that a Juſtice of peace cannot diſplace ſuch a Conſtable being elected, and ſworn to be Conſtable in the Court Leete (as here, in this caſe he was) alſo a Juſtice of peace is not to elect a petie Conſtable. In the principall caſe here, the cuſtom of the place was that the neighbours in the Hamlett, were to make choice of ſuch a one to be their Conſtable, and to preſent him to the Lord Wentworth, Lord of the Mannor, and then to have him ſworn, a Juſtice of peace cannot diſplace ſuch a Conſtable. In this caſe, the matter was, the Juſtice of peace did remove, and diſplace this Conſtable, (thus elected, and ſworn,) and did elect, and ſweare an other, to execute the place of a Conſtable there, and they of the Hamlett according to their—Cuſtome did chuſe their former Conſtable again, and diſplaced the other, and upon this he prayed a writt of Reſtitution to be reſtored to his place of Conſtable again, being formerly choſen, and ſworne to execute the ſame, by the Juſtices of peace. Williams Juſtice, there is no preſident of ſuch a writ of

No Writ of Reſtitution for Conſtable to his place.

of Reſtitution, for a Conſtable. But an order by the Rule of the Court was entred, that the firſt diſplacing of the Conſtable choſen by the ville, and approved of by the Lord, was altogether unlawfull, and the Conſtable choſen, and ſworn by the Juſtices of peace, to be removed, and the firſt, to be Conſtable again, and ſo to continue according to the Election of the Hamlet, and that the Juſtices of peace have no power in this caſe over him, as to diſplace him, but that the Lord, who did approve of the choiſe of him, may again, for juſt cauſe, remove, and diſplace him, and ſo may the Juſtices of peace do by the Conſtable of the hundred, or high Conſtable, for good cauſe. And all this was cleerely ſo agreed, by the whole Court, and ſo no writ of Reſtitution granted, but an order by the Rule of the Court, for the reſtoring, placing, and ſetling of the firſt Conſtable, (choſen by the ville, approved of by the Lord, and ſworn) in his place again.

## *Hewet* Plaintif againſt *Painter* Defendant.

An Action of Debt upon a Bond, &c.

IN an Action of Debt upon a bond, the Defendant, demands oyer, of the bond, and of the Condition, the condition of which bond was, that the obligors were for to pay, all ſuch ſums of money for tithes which ſhould be Levied, and upon the oyer of the Condition, the Defendant demurres in law, and the queſtion was touching the expoſition of the words (which ſhall be Levied) whether theſe words ſhall not be conſtrued, in this manner (s). Levied, or to be Levyed, and alſo whether, levyed

tared,

taxed, or assessed, shall not be sayd, in construction of law, to be all one, and as touching this, it was urged, that words shall be taken and construed, according to the intent of the parties, and intention, and construction of words, shall be taken according to the vulgar and usuall sence, and manner of speech, within those places, where the words are spoken, as in Lincolshier, where 8. strikes make a bushell, the Judges of the Common law, are for to take notice of particular usages in severall places, as of London measure in buying of cloth there, and so the particular usages, and the manner of speech in particular Countryes, is it to be respected, as in common parlance to say of one in such a place, that he hath strayned a mare, this is taken for distrayned, with such an averment of the usage there to be so. If an action upon the case be brought against one, for the taking of a silver salt, and it was a silver saltsellar, this was excepted against, but adjudged here, that the action was well maintainable, for that this is all one in Common speech and parlance, and to this purpose a case was cited to be adjudged in the C.B. that King Stephen by his letters pattents, did grant unto one Alga maris, which word (Alga) doth signify a weed which came in with the flowing of the sea, at a new moone, and was but of small value, this was there ruled to be a good grant of the wrecke, which the water then brought in with the said weed.—Croke Iustice, the demurrer here is not good, as to the words, (s) taxed, rated and levied, idem significant, being all one, and to the same purpose, and effect. Alga maris, is a weed, which comes in at the same time onely, with the new moon, there they did make a favourable construction rather then to suffer the grant to bee void, so where it it sayd here, Levied, or to be levied, or taxed, this is all one. 9. E. 4. fo. 22. an action of Debt upon an obligation, brought against one as executor, conditioned, that if one T. which was register of the Plaintiffe, and his receivor of divers profits within the Archdeconry, should truely pay unto him, omnia recepta, & recipienda, in the said office, that then the sayd obligation to be voide, shews that T. which was his receiver, and had received divers summes, and made the Defendant his executor, and the Defendant by way of plea sayd, that he had payd unto the Plaintiff, all which his Testator had received, he was here to give an account for both. Flemming chief Iustice, & Williams Iustice, agreed herein that this goeth unto both, (recepta, & recipienda,) Flem. chief Iustice, Levied, that is to be levied, & according to the custom of the Countrey, taken for taxed, he shall be bound by this, for to pay all such Summes of money, as the Sherif shall levi, by this is to be understood all such Summes of money, as shall come to the Sherife for to be Levied, Malleryes case Coke 5. pa. fo. 111. where an Abbot and his Covent made a Lease for yeeres, reserving rent yeerely to him, or his successors, that this shall be taken, and construed, for him, and his successors (or) there taken for, (and) and as touching construction of words, they shall be taken, according to the Common parlance, phrase, and custom of speach where the words are spoken. 27. H. 8. fo. 27. b the meaning and intent of parties, is to be observed, and to this purpose Fitzherbert there puts the case that if two do make a Contract for 18. Barrells of ale for a certaine summe of money, and he which bought the barrells of ale, would have had into his bargayne, the barrells also, when the ale was spent, but it was adjudged that he should not have the barrells, for that the common usage was, that the vendor should have his barrells again, and the intent of the parties never was, that the vendee, should have the barrells, but only the ale, so it a man do Covenant with another, that if he comes to his house, he will give him a cup of wine, if he come he shall not have the cup, also, for that this was never the intent of the partie, the case remembered of Alga maris, was this, King Stephen, by his letters patents did grant unto such a towne, neere the sea, Alga maris which as Virgil observeth is a weede, growing in the sea, having leafe like unto sea grasse, or sea weede, being very bitter and sharpe which word dis import a grant of the wreeke, for that words are to be taken, according to the intent of the parties, and this intention, and construction of words shall be taken, according to the vulger, and usuall

Malleries case Coke 5. pa. fo. 11. a.

As touching the Expositi-on of words to be according to the usage and common parlance of the place where spoken

usuall sence, phrase, and manner of speech of these words, and of that place where the words are spoken, as the case before remembered, of strayning of a mare taken for distrayning, and an action upon the case was brought for words spoken by the Defendant of the Plaintiffe. That he was (mainsworn) these words were taken and construed according to the common parlance of the place where the words were spoken, and so to be all one with foresworn, and so was it accordingly adjudged in the Court of C. B. in the case of Alga maris, and so in the principall case here to pay all such summes of money which should be levied, the same is to be so construed, and understood, (s) levied, or to be levied, taxed, or assessed, this is all one, which summes the Defendant here in this principall case was to pay, by the condition of this bond, the demurrer overruled by the Court, the Defendant having no just cause to demurre, but the Plaintiffe a good cause of action, and therefore by the Rule of the Court Judgement was entred for the Plaintiffe.

Judgement, given for the Plaintiffe.

## *Holland* Plaintif, against *Harecourt* Defendant entered. Hillar. 8. Jac: B. R. Rott.

## 1136.

An action of Debt upon a bond &c.

IN an action of Debt, brought upon a bond, upon Oier demanded the Condition was this, that Holland the Plaintiffe was to go with such a shipp, unto such a port, to Guyana, and when he did directly return back again laden, Harecourt the Defendant, was to pay him so much money for the marriners wages, and for his hire, the Plaintiffe sets forth in his Declaration, that he did accordingly go the voyage, and that he had been at Guyana, and returned again, and that the Defendant refused to pay the money, upon which refusall the action was brought, the Defendant by way of Barre, pleads that the Plaintiffe had not performed his voyage, alledging, that viagium ad Guyana nondum finitum and so not to pay the money, the Plaintiffe Replyes, and sets forth, that he hath performed his voyage to Guyana, and returned again, and so the money due to be paid unto him, the Defendant rejoynes, and sets forth, that it was but a moneths sayle thither, that he had made it a longer voyage, and so a greater charge, and that he had not directly returned, the right and direct way, to this Rejoynder the Plaintiffe demurres in law, for that this was a Departure, and whether this manner of pleading in the Rejoynder was a Departure or not, was the question. In this case, and as to this question, it was said, and agreed by the whole Court, that where a pleading doth pursue and fortify the former matter pleaded, this shall be no Departure, but otherwise it is, where there is new matter pleaded. As where a man pleades that I. S. Dyed without heire, the other sayes, that I. S. had an heire, and names him, the other again by pleading shewes that the same I. S. was attainted, and thereby his blood corrupted, and that so he dyed without heire, this pleading doth fortify the former matter, and so is no — Departure, and so if one be bounde for to enfeoffe another, and pleads performance, the other pleades that he hath not performed; having made no Feoffment unto him, the other by pleading comes and shewes that he hath performed the condition, in this manner, (s) that he made unto him a lease for yeeres, that he did after releas unto him, and his heires, though this be a good performance of the condition, by the booke 17. E. 4. fo. 3. a Brooke title Conditions placito 158. (yet this is a Departure, being new matter.) In this principall case here, Holland the Plaintiffe was to go with such a ship unto Guyana, and when he directly returned again, then Harecourt the Defendant was to pay him so much for the marryners wages, and for his own

where there shall be a Departure in pleading, and where not, where the plea doth fortify and where a new matter is pleaded. Note the difference

hire

hire, the Court was cleere of opinion for the Plaintiffe, that he had just cause of action, for due debt now upon his retorne, to be payd to him, by the Defendant, but some question happening to arise, upon the pleading, and the parties perceiving the opinion of the Court, which way they enclined, they dis mutually agree to have the matter ended, and composed between them by agreement, and so they reserved themselves to parties chosen by them, finally to end, and determine the same between them. Ended by agreement.

NOta, as touching a question propounded by Walter when a lease should be sayd to begin. Flemming chief Justice, tooke this difference where a deede is delivered, to begin, à die datus, and where it is à datu, where a deed is delivered, for to take his force, and effence, à die datus, in this case, it is exclusive, and the day of the date is excluded, but otherwise where it is à datu, there it is inclusive and the day included. This difference holds place, and is good, where it is in a case, and point of interest, that is conveyed, or passed from one to another, as in case of a Lease for yeeres, or any other interest that is passed, and so is Claytons case Coke 5. pa. fo. 1. But where it is in matters of account, where no matter of interest is to be passed, or conveyed, as if one be, to be accountable to another, and that by deed, be the same to be done, à die datus, or à datu, in this case, no interest passing by the deed, be the same à die datus, or à datu, it is all one, and no difference between them, as was cleerely held by Flemming chief Justice, and so agreed by the Court. Note the difference where a deed is to begin, &c

Note the difference between matter of interest, and in matter of account,

## *Moore*, and *Lanckfoordes* case.

BEing Indicted upon the statute of 8. H. 6. cap. 9. for a forcible entry, and the Indictment found against them, A Writ of error by them brought to reverse the Indictment, the error assigned was for the want of an (adtunc) the Indictment being existens liberum tenementum of J. S. and doth not say adtunc existens—and also it is not sayd in the Indictment that (ibidem) they did enter—It was urged that the severall Indictments against Williams and Skidmore, upon the same statute of 8. H. 6 cap. 9. were both of them reversed, for want of (adtunc.) Hen Yelverton, this hath been divers times ruled here, for to be a good error, as in the cases before cited, for it may be (existens liberum tenementum.) before or after, and not adtunc, and therefore he ought to say adtunc existens, or it is not good. Williams Justice. If in the Indictment he had begun, with the day time, and peere, then all which doth follow after shall be taken, and intended to be at the same time, and for this was cited—5. E. 6. Dyer. pla. 68. and 23. H. 7. in Kellaway fo. 98. & the like indictment was here reversed the Last term, for want of (adtunc) for that it may be existens liberum tenementum twentie yeeres before. Flemming chief Justice, and Williams Iustice all being here coupled together, the day, the time and the place, then the words makes all good, for thereby it appeares that it was his freehold, and the time being here layd when he entered, this Indictement may be good enough without saying (adtunc) and so they seemed both of them to hold cleerely, that this Indictment was good, yet they did not overrule it, but gave time to search for Presidents. A Writ of error for to reverse an indictment, &c.

*Eynan* Plaintif, againſt *Bridges De*. fendant entered. Trint. 8. Iac. B. R. Rott.

1222.

An action of Debt upon an award, for not performance of it, by payment of money awarded to be paid.

IN an action of Debt, brought, for not perfoꝛming of an awarde made foꝛ payment of money, the caſe appeared to be this, the parties mutually referred themſelves to the arbitrement of others by them choſen, and bonds by them entred into each to the other, foꝛ perfoꝛmance of the award, the Arbitratoꝛs made their awarde, foꝛ payment by the Defendant, to the Plaintiffe, at a day to come, the award was made the 24th. day of March, foꝛ the payment of money, to be made, by the Defendant to the Plaintiffe, at Michaelmas then next enſuing, foꝛ not payment of this, an action of Debt, brought in Barre, of which action, the Defendant pleads a releas, made to him by the Plaintiffe, of all actions, and demands, bearing date the 10th. day of Aprill, and it appeared by the award, that the Plaintiffe, was to make a releas unto the Defendant, of all actions, and demandes, ſiem the beginning of the woꝛld unto the 10th. day of Aprill, then next enſuing. The onely queſtion was, whether by this releas thus made, the payment of the money, awarded to be payd, by the Defendant to the Plaintiffe, at Michaelmas then next following by foꝛce of the award, be abſolutely gone, and releaſed, by this releas or not. It was urged foꝛ the Plaintiffe, that this payment thus to be made, at a day to come, by the Defendant to the Plaintiffe, by foꝛce of the ſame award, is not by this releas, diſcharged, and releaſed by the Plaintiffe, but that the Debt ſtill remaynes due unto him, and that he hath good cauſe of action, to recoꝛder the ſame by this action brought by him, upon his bond, foꝛ perfoꝛmance of the award, and that this releas ſhall be no barre unto him, wherein it is to be conſidered, whether this weꝛe a debt, due unto the Plaintiffe, at the time of the releas made by him, oꝛ not, and when the ſame doth firſt commence and begin foꝛ to be a debt, and duty in him, and as touching this, it appeares by Littleton in his Chapter of Releaſes, pla. 512. that if a man be bounde to pay ſuch a ſumme of money, at the feaſt of St. Michael next, if the obligee befoꝛe the ſayd feaſt do releas unto the obligoꝛ all actions, he ſhall be barred by this releas, foꝛ that this is a duty preſently, but the payment is put in reſpite, untill a day to come, but otherwiſe it is, in Littletons caſe pla. 513. of a Leaſe foꝛ a yeere rendering to him at Michaelmas next 40.s. and befoꝛe Michaelmas, he releaſes to the leſſee all actions, this rent is not releaſed, foꝛ that it is not a duty til the day of payment, ſo is the opinion of all the Judges, in L. 5. E. 4. fo. 40. and ſo is the booke of 9. E. 4. fo. 13. a 67. Coke, that in caſe of a bond, the ſumme to be payd at a day to come, is a duty preſently, but it was urged that in caſe of an Annuitie, to be payd at a time to come, it is no debt, befoꝛe the time of payment be come, and ſo in caſe of an Arbitriment, an awarde made foꝛ to pay money at a day to come, it is no debt, noꝛ duty untill the day come, and thereforꝛe, not to be releaſed in this manner befoꝛe the day, as in the principall caſe here it was of all actions and demandes, and thereforꝛe this releas ſhall not free, and diſcharge the Defend. of and from the payment of the money awarded to be payd, by him to the Plaintiffe, at a day to come, and ſo the Plaintiffe hath good cauſe of action. Williams Iuſtice. In caſe of an Obligation entered into, foꝛ payment of money at a day to come, this cleerely is a debt and a duty preſently, and may well be diſcharged, by a releas made, of all actions and demands before the day of payment comes, but is it as cleer, that it is not ſo in the caſe of an Annuity, noꝛ in caſe of an action of debt, foꝛ not performance of an Awarde made for payment of money, at a day to come, for in theſe caſes, there is no preſent debt, nor duty before the day of payment

Note the difference where money is to be paid by bond at a day to come, and rent to be ſo paid, and a releaſe made before.

payment do come, and for this cause, not to be discharged by a release of all Actions and Demands before the day, the whole Court inclined to be of the same opinion, but no Judgement was then given for the Plaintiffe, but the Court were of opinion, that he had good cause of Action, and not to be barred by this his release thus pleaded against him, this case was not moved again, but was ended between the parties, they perceiving which way the Court inclined in their opinions.

## *Norcot* Plaintif against *Heywood* Defendant, entred Mich. 8 Jac. B. R. Rott. 350.

A writ of error for to reverse a judgement in an action upon the case.

IN a writ of Error brought for to reverse a Judgement given in an Action upon the Case, in an inferiour Court, the Errors were assigned by Coventry for the Plaintiff in the Writ of Error, that the judgement given was erroneous. The first Error was, that the Judgement was (Ideo concessum est per Curiam, whereas it ought to be Ideo consideratum est per curiam. The second Error, that the Judgement was, quod capiatur, whereas it ought to be quod sit in misericordia. The Court were cleere of opinion, that both these Errors are good, and to be allowed of, and that the judgement is erroneous, and for these errors, by the Rule of the Court, the judgement was reversed.

Judgement reversed per curiam.

## *Holts* Case.

A Prohibition to the spirituall Court, &c.

IN a Prohibition prayed unto the Spirituall Court, the case appeared to be this, (s.) Holt was presented, instituted, and inducted to the Parish Chuch of Storrinton, afterwards Doctor Wickham draws him into the Spirituall Court, questioning of him for some matters, as touching the validity of his induction, and upon this, a prohibition was by him prayed. Williams Justice, a Prohibition here in this case ought for to be granted, this being directly within the Statute of 45. E. 3. cap. 3. for here the very title of the Patronage comes in question, with the determination of which, they ought not there for to intermeddle, also matter of induction, and the validity thereof is determinable at the common Law, and not there by them in their Court, and therefore for to prohibit their proceedings in this case, a Prohibition ought to be granted, the whole Court agreed with him herein, and therefore by the Rule of the Court, a prohibition in this case was granted.

A prohibition granted by the Court.

## *Buseby* Plaintiffe, against *Hadderton* Defendant, entered Hillar 9. Iac. B. R. Rott. 182.

An action upon the case for a promise, &c.

IN an Action upon the case for a Promise, upon Non-assumpsit pleaded, a Verdict was found for the Plaintiff, and upon a motion in arrest of judgement, the case appeared to be this, the Plain. sold unto the Defen. a parcell of sugar at 17. d. ob the pound quæ in se toto attin. to so much, & afterwards the Plan. sold unto him another

parcell for ſo much, que in toto ſe attingunt to ſuch a ſumme, and afterwards the Plaintiffe ſummes up altogether, with this que in toto ſe attingunt to ſuch a ſumme in conſideration of all which, the Defendant did aſſume and promiſe to pay this unto the Plaintiffe, which laſt ſumme in the laſt caſting up, (que in toto ſe attingunt to ſo much is (11 d.) more then the 2. former ſummes truely caſt up amounted unto, the promiſe was, to pay the laſt ſumme, as it was caſt up, in which the miſtake was, and this was moved in Arreſt of Judgement, for that this doth not now appeare for to be one, and the ſame contract, becauſe that (11 d.) more is in the laſt caſting up, que in toto ſe attingunt to ſuch a ſumme, then is revera in the two former ſummes, and therefore it was urged by Geo. Croke for the Defendant, that for this cauſe Judgement ought to be arreſted, and to the ſame purpoſe he remembred a caſe adjudged here in this Court, but afterwards reverſed, by a writ of error in the Exchequer chamber, and that upon this reaſon, becauſe that the ſumme caſt up in the laſt totall (which was promiſed to be paid) was leſſe by a penny then the other ſeverall ſummes truely caſt up amounted unto) and ſo this appeared not to be the ſame contract, and for this reaſon the Judgement was reverſed, and the ſame reaſon is here for the arreſting of this Judgement, there the laſt totall in the caſting up was (a penny) Leſſe then the former ſummes, and here in this caſe the laſt totall in the caſting up, is 11. d) more then the former ſummes, but the reaſon is the ſame in both caſes—Williams Iuſtice, it is very cleare, that theſe words in the Laſt—totall, que in toto ſe attingunt, to ſo much are words meerely ſuperabundant, if the ſeverall ſummes before, (being the ground and conſideration of the promiſe to pay) are caſt up right, for that the aſſumpſit to pay, hath relation to the other ſeverall ſums for which the goods were delivered, the like caſe was here in this Court adjudged, being one Lantons caſe & affirmed upon a writ of error in the Exche. cham. where like variance was in the caſting up of the laſt totall, the former ſums being right, and this was held to be amendable, & was here amended, and the laſt totall amended, & made for to agree with the other ſummes, and ſo this variance and miſtake here in this caſe in the caſting up of the laſt totall, is amendable, and ought to be amended, and made to agree with the other ſummes which are rightly caſt up. Croke Iuſtice, the contract here hath reference unto the parcells, before named in particular, and if it appeares in the caſting up of the laſt totall, que in toto ſe attingunt to ſo much, be the ſame, more or leſſe, then the before named particular ſummes, do amount unto then this, non eſt idem, but a ſeverall contract. ——— Flemming chief Iuſtice, The aſſumpſit here is the ground and cauſe of the action, and therefore, if one in conſideration of a horſe of 10. l. price delivered to him, do promiſe to pay unto him 20 l. for the horſe, this is true and good, and this his promiſe ſhall bind him, to pay the 20. l. and it may be ſo here in this caſe, if the promiſe be to pay ſo much here, as by the caſting up of the laſt totall it is ſaid to be, this will then bind him to the performance thereof, and as to the Amendment where a miſtake is in the caſting up of the totall, this is true, as it hath been obſerved, and the ſame is matter amendable in many ſuch like caſes, but herein this difference is to be obſerved, where the Plaintiffe frames his Declaration, according to an account of particular ſummes taken by himſelf, and where it is by the parties which do aſſume to pay for the ſeverall commodities delivered, que in toto ſe attingunt to ſuch a ſum, wherein the miſtake is, if it be by the partie himſelf, and there is more caſt up in the laſt totall, then in the former, this is not idem, nor yet amendable, but otherwiſe it is where the ſame ſo is done, by the partie which doth aſſume. Yelverton Iuſtice, put the caſe to be without any ſuch caſting up, with a que in toto ſe attingunt, to ſo much, as if one do ſell an Horſe to another, for ten pound, or an Ox for five pound, and for this, he promiſeth to pay him twenty pound, cleerely this is good, and he ſhall be bound to performance by this his promiſe, the difference is good, which hath been taken, where the variance & miſtake is the default of the Clerk in caſting up of the ſum and ſo miſtakes in the totall, this is matter amendable, and the ſame hath been uſually amended, but otherwiſe it is where the variance and miſtake is meerely the default of the partie himſelf, in caſting up of the totall, this is not amendable, but this

Lantons caſe in B. R. & affirmed in a writ of error.

Note the difference where a miſtake in caſting up of a ſomme is amendable, and where not.

this caſe now here in queſtion, doth ſomething differ, for that the former ſummes, which the parcels delivered amounted unto, were caſt up right in the que in toto ſe attingunt, but the miſtake is in the caſting up of all together in the laſt, and generall totall, this may in reaſon be amended, and made to agree with the former ſummes which are caſt up right, if the Preſidents of the Court will warrant it— Man. Secundary informed the Court, that he had Preſidents direct in the point, for amendments of ſuch miſtakes of the parte, in caſting up of the laſt totall, where the former ſummes were right, upon the producing of which Preſidents, this miſtake in the caſting up of the laſt totall, was by the Rule of the Court amended, and made to agree with the former ſummes, and by the Rule of the Court, Judgement was entred for the Plaintiff.

The miſtake in caſting up of the totall amended &c.

## *Smith* Plaintif againſt *Flint* Defendant.

IN an Action upon the caſe brought by the Plaintiff for ſlanderous words ſpoken by the Defendant of the Plaintiff, upon Not guilty pleaded, a verdict was given for the Plaintiff. It was moved in arreſt of Judgement, that the words were not Actionable. The words being, that the Defendant ſaid of the Plaintiff, that he had harbored and received his Sonne into his houſe, having notice of him before, that he was a Seminary Prieſt, the Court were all of them cleere of opinion, that theſe words are in a high meaſure ſcandalous, and Actionable, for that the ſame offence is made felony by the Statute of 27. Eliz. cap. 2. and therefore by the Rule of the Court, judgement was given for the Plaintiff.

An action upon the caſe for words.

Judgement given for the Plaintiffe.

## *Baker* Plaintif againſt *Baker* Defendant.

IN an indictment of Felony, and an Outlawry upon it, A Scire facias againſt the Ter-tenants, to ſeiſe the goods of the partie Outlawed, in ſtay of which, 2 Errors were aſſigned for to reverſe the Outlawry, and Bridgeman for the partie outlawed alledged Diminution of the Record, there being in the Court a Tranſcript of the Record of indictment, but not the Record it ſelf. Williams Juſtice, in caſe of error upon indictments to reverſe them, the body of the Record it ſelf is to be removed, and a Tranſcript of it is not ſufficient. Flemming chief Juſtice, if the Error be aſſigned in the Outlawry, only Diminution may be alledged, there being only a Tranſcript of the Record, but if the Errors be aſſigned upon the outlawry, and alſo upon the body of the indictment, here in this caſe, the body of the Record ought for to be removed, and to be in Court, and a Tranſcript is not ſufficient, and ſo it was in this caſe, and therefore by the Rule of the Court, a Certiorare was granted for to remove the Record it ſelf, and that afterwards Diminution may be alledged.

Error for to reverſe an outlary upon an Indictment.

Note the difference

A Certiorare granted for to remove the Indictment.

## *Umphery* Plaintif againſt *Damyon* Defendant.

IN a tryall at the Bar by an Eſſex Jury, in an Action of Treſpaſſe and Ejectment, this Caſe upon the evidence came in queſtion. Leſſee for years rendring rent payable at Michaelmas next coming, upon a condition of reentry, for default of payment, afterwards the Leſſee is ouſted by a ſtranger, the diſſeiſin continues till the day of payment, and after the Rent is demanded by the Leſſor, and not paid, Dodderidge Sergeant moved this queſtion, to have the reſolution of the Court in it, inaſmuch as by the Diſſeiſin, the Condition is in ſuſpence, whether the Leſſor may enter for the condition broken, the Land being in the hands of a Diſſeiſor, he urged by way of argument for his Clyent, that the Leſſor could not enter for a forfeiture,

An action of treſpas, and ejectment &c.

forfeiture, but that he might come and diſtraine for his rent behinde upon the Land. But by the whole Court clearly, & without any queſtion he may enter upon the Land for the condition broken, for that in whoſe hands ſoever the Land is, the ſame is, and ſhall be ſubject to this condition of entrie, for non-payment of the rent, or if he will, he may diſtrain for the ſame, and by Flemming chief Juſtice, the entrie of a ſtranger upon Land leaſed, ſhall not take away the rent entry, or any condition of any perſon, the whole Court agreed with him herein.

## *Ellis* Plaintiffe againſt *Parke* Defendant.

An iniunction out of the Chancery after 3. verdicts to ſtay the Plaintif from praying his judgement.

NOte, that after three ſeverall verdicts paſſed for the Plaintiff, the Defendant prefers a Bill in Chancery, and procures an injunction thereby, prohibiting of the Plaintiff from praying to have his judgement according to his verdict, ſo that for this cauſe, and for fear he durſt not demand to have his judgement. Yelverton moved the Court in this, to ſee if they would give direction for to enter the judgement without the prayer of the partie. Williams Juſtice clearely of opinion, that in this caſe judgement may well be entred without the prayer of the partie, the Court by information, having notice of this, that the partie is barred from praying of his judgement, by reaſon of the injunction. Flemming chief Iuſtice, though the partie being enjoyned from praying of his judgement according to his verdict, yet this Court cannot be prohibited from granting of judgement, and therefore if any one will pray Judgement for the Plaintiff, he ſhall have it upon this.—Yelverton at the bar, ſaid that he was not letted with any injunction, & therefore he for the Plaintiff (who was injoyned) prayed judgement for him, the which was granted him by the whole Court, and ſo by the Rule of the Court iudgement was entred for the Plaintiff. See to this purpoſe the Book caſe in 22. E. 4. fo. 37. Brook tit. Iudgement placito 86. a notable caſe touching this matter in treſpaſſe by the Husband, for taking the goods of the wife, & carrying of them away dum ſola fuit, a verdict for the Plaintiffs and 20. l. dammages, an injunction came unto him out of the Chancery, that he ſhould not proceed to judgement ſub pœna 100. l. there by Fairefax he may pray Judgement, notwithſtanding the injunction, and if he be injoyned, his Atturney may pray it, and by Huſſey, no hurt can come to the partie if he prayes his Iudgement, and if for his ſo doing he be committed to the Fleet, he may have a Habeas Corpus, and be diſcharged here, where the Court will do all they can for him, the Court there ſaid, that if the Plaintiff would pray his Iudgement, he ſhould have it, & ex hoc patet, that the Court will never give judgement, unleſſe the Plaintiff, or ſome one for him do pray the ſame.

Judgement prayed, and given for the Plaintif, &c.

## *Stevenſon* Plaintiffe againſt *Powell* Defendant, entered Hilar. 9. Iac. B. R. Rott. 164.

An action of Covenant by an under Leſſee, &c.

IN an Action of Covenant, the caſe appeared to be this (s.) Leſſee for 21. years rendring rent with a Condition, for to re-enter, for not payment of the rent, the Leſſee doth leaſe parcell of the land unto the Plaintiffe for a leſſer terme, at, and under a leſſer Rent, with this ſpeciall Covenant, that

the

the Plaintiffe, being his under Leſſee, ſhould enjoy this, without the impeachment of him, or of any other, occaſioned by his impediment, interruption, meanes procurement, or conſent, and afterwards, the Defendant did not pay, his rent reſerved upon his conditionall leaſe by reaſon of this not payment of his rent cauſe of entrie was given to his leſſor, by his default, and negligence, in not paying of his rent, and for this cauſe, by force of the condition, the firſt leſſor, did enter into the whole, and ſo by this, avoided the terme of the Plaintiff, being the ſecond Leſſee, and for this cauſe the Plaintiffe, here brought his action of Covenant againſt the Defendant, his leſſor, for that by his meanes, (s) by his not payment of his rent, the Plaintiffe was defeated of his leaſe, & ſo a breach of his covenant, being not ſuffered to enjoy his leaſe by reaſon of his default, in not paying of his rent, the whole Court, cleere of opinion that here was a breach of Covenant, on the Defendants part, by not paying of his rent, according to the condition of his leaſe, and that for this cauſe, the Plaintiffe hath juſt cauſe of action, for breach of Covenant, his Leaſe being avoyded, by the Defendants neglect, and Default, and therefore by the rule of the Court. Judgement was entered for the Plaintiffe.

Judgement given for the Plaintif, per curiam.

## *Ordeway* Plaintif againſt *Orme* Defendant.

NOta that upon a tryall at the Bar, in an action of treſpas, this queſtion did ariſe as touching a preſcription, which was this, quod quilibet pater familias) Anglice a houſeholder) in Da. time out of minde, ought to have Common of paſture, in an other ville. Geo. Croke in all corporate villes, the tradesmen have antient houſes, and have uſed for to keep their cattell within the ville, and to have Common of paſture within the fields adjoyning. Williams Iuſtice, who ſhall be ſayd to be a houſeholder, within this preſcription is uncertaine, but if the preſcription had been to have Common belonging to a houſe, this had been good, but the preſcription as it is here layd to be, cannot be good, and ſo it hath been ruled in the Court of C. B. the court all agreed with him herein, that this preſcription here, is not good. Hen. Yelverton. The Lord Chancelor hath likewiſe overruled this in like manner in chancery and for this, vide Coke 6. pa. fo. 60. &. 61. in Gatewards caſe. and 15. E. 4. fo. 29. &. 32. &. 33. the caſe concerning Coventry, the rule of the Court in this principal caſe was that a Juror ſhould be withdrawn, & ſo the matter to be ended by agreement for that the preſcription being the grounds of the title that was made, was overruled by the whole Court to be a bad preſcription, and ſo accordingly a Juror was withdrawne and the Jury payd indifferently between the parties.

A preſcription for every houſeholder to have common of paſture in alieno ſolo nos good

A Juror withdrawn by direction of the Court.

## The *King* againſt *Haſtinges* and others.

NOta, that Haſtinges, and 18. others, were endicted for a Riott in Lincolnſhire, and I. S. of Huttoft, Yeoman, exception was taken to quaſh the Indictment——becauſe there was no addition of the place, where the parties Indicted did dwell for that the place of Huttoft, is only, for I. S. the laſt party named, but no addition of any place, for the reſt, and for this cauſe it was prayed that the Indictment might be quaſhed. Williams Iuſtice, the word Yeoman, goes to all, reddendo ſingula ſingulis, but the place here named of Huttoft doth not goe to all, but to the laſt man named, and for this default of addition of a place, where the other parties Indicted did dwell for this cauſe by the rule of the Court, the Indictment was quaſhed, and the parties Indicted, diſcharged.

Judgement for a Riot quaſhed, becauſe no place named where the parties dwell.

Nota,

A ſubmiſſion to 4 and to the umperage of a fifth,&c.

Nota, that this queſtion was moved unto the Court, ariſing upon a ſubmiſſion to an award, where the ſubmiſſion was, of all actions, ſuits and quarrells unto 4. perſons and the umperage of another, and the aſſumpſit was mutualy to ſtand unto and perform the order of them 5. the 4. perſons and the Fifth as Umpire, did make the award, and the partie ſubmitting, did refuſe to perform this order and award, ſo by them made, the queſtion propounded was, whether this award thus made, was made according to the ſubmiſſion or not. Williams Iuſtice, that the award was well made, and purſuing the ſubmiſſion, but otherwiſe it had been, if in the ſubmiſſion they had been divided, in the ſubmiſſion, as it had been in this manner, that if the 4. could not agree, in their awarde, that then, the ſubmition to be, to the umperage of a fift man, then theſe 5. could not all of them joyne, in the making of this award, but the ſubmiſſion being here to 4. and to the umperage of a fift, they all 5. may well joyne in their award, and ſo the award here, made by them all 5. is cleerely good and well made according to the ſubmiſſion, and the ſame award ought to be perform-ed, the whole Court agreed with him herein.

## *Harris* Plaintif againſt *Sherley* Defendant, entered Trinit. 9. Iac. B.R. Rott.

## 1321.

A Writ of error to reverſe a judgement upon a bond, &c.

IN a writ of error for to reverſe a Judgement given by default upon a Non Sum informatus pleaded in an action of debt, upon a bond of 80. l. the error aſſigned was, that the Originall was againſt Sir Francis Harris De Browton, and the Declaration was De Brownton, as to this, it was anſwered, that Miſnamer is not to be pleaded after Imparlance, and ſo this plea here, is not good after Judgement. Williams Iuſtice, variance is not ayded by any ſtatute law, and it appeares by 9. E.4. fo. 51. b. where a Judgement in a writ of Annuitie was reverſed becauſe that the writ was, Præcipe quod reddat 26. markes. 6 s. 8. d. and in the Court the 6. s. 8. d. was leſt out, and for that it did diſagree, and not warranted by the writ, the Judgement was reverſed, for that this was not miſpriſion, for the Court is by the party, and not by the Clarke. And ſo if the Originall be I. S. de Aggrave, and the Declaration is de Dedgrave, this is a variance and not helped by any law. Yelverton Juſtice, It is true as hath been ſayd that a man ſhall not pleade miſnamer in ſuch a caſe, but here it is not ſo, for this is a playne variance, and this appeares for to be ſo upon the record, being here in court, and the ſtatutes which are made, to help the default of a letter, or a Syllable, the ſame are of no force at all, to helpe ſuch a default in Declarations, the whole Court was of the ſame opinion, that by reaſon of this variance the Judgement is erroneous, and the ſame is out of the help of any ſtatute, and ſo by the rule of the Court for this cauſe the Judgement was re-verſed.

Judgement reverſed by the rule of the Court,

*Williams*

## *Willins* Plaintif againſt *Fletcher.*

IN an action upon the caſe in the nature of a conſpiracy, the caſe dis appeare to be this. Fletcher in the countie of Northampton preferred a Bill of Indictment againſt Willins for being a Common Barretor, and he was ſworn before the Iuſtices of Peace, that the matter in his bill contayned was true, upon this the Jury gave a verdit againſt Williins, for which he brought this action upon the caſe, in the nature of a conſpiracy, pretending that by reaſon of his oath the Indictment was found by the Jury againſt him. Geo. Croke for the Defendant, that this action doth not lie againſt him, for that he is onely one perſon, and doth only take his oath upon the Indictment, but a conſpiracy is, where 2, 3, or more do conſpire for to Indict one, and the ſame lyeth not againſt one, where he only comes in and ſweares to the truth of his bill, for if this ſhould be taken for a conſpiracy, no Indictment would then be perferred by any one upon the reaſon given in Cutler and Dixons caſe. Coke 4. pa fo. 14. b. for that then no man would dare to complaine, if for ſo doing he ſhould be lyable to an action, and ſo upon this reaſon it was likewiſe lately adjudged here in this Court, in Porter and Griffins caſe, that in the like caſe with this now in queſtion, an action upon the caſe in the nature of a Conſpiracy would not lie, and if a Juror, or a witneſſe do come in upon his oath, an action upon the caſe for this lieth not againſt him, the whole Court was cleer of opinion, that in this principall caſe here, an action upon the caſe, in the nature of a conſpiracy doth not lie, and therefore by the rule of the Court Judgement was given for the Defendant, quod querens Nil capiat per billam.

An action upon the caſe in the nature of a conſpiracy, &c.

Porter and Griffins caſe, ad. in B. R.

Judgement by the Court for the Defen.

## *Wemſtone* plaintif againſt *Webbe* Defendant.

IN an action upon the caſe for a promiſe, the caſe appearred to be this, I. S. being poſſeſt of goods, makes his will, and makes the Plaintiff his executor, the Defendant in conſideration that the Plaintiffe would forbeare to joyne in the probate of the teſtament, & relaxaverit totalem executionem of the will of the Teſtator, the Defendant did aſſume, and promiſe, that when the Plaintiffe came to ſuch a place, that he would pay him—11. l.—and did averre in facto, that he came to the place ſuch a day, that he had forborne the probate of the will, and had made the releaſe, but the Defendant according to his promiſe had not payd him the 11. l. whereupon he brought his action, and declared, ad damnum, upon Non aſſumpſit pleaded a verdict was given for the Plaintiffe. Geo. Croke for the Defendant, moved the Court in Arreſt of Judgement, that the Declaration was not good, for that for one executor to relinquiſh to another, this is no benefit, but a truſt, and ſo the ſame is no good conſideration for to ground a promiſe upon to pay money. Flemming chiefe Juſtice abſtayning, and relinquiſhing, is renouncing, and as to the words (totalem executionem) this is as much as to ſay, totaliter. Williams Iuſtice, agreed with him herein, and that this doth amount to as much, as to forbeare; the whole Court agreed in this, that here was a good conſideration, and that the Plaintiffe had juſt cauſe of action, and therefore by the Rule of the Court Iudgement was entred for the Plaintiffe.

An action upon the caſe for a promiſe, &c.

Judgement for the Plaint.

## *Harriſon* Plaintif againſt *Iames* Defendant.

An action of debt for money won at play. &c.

IN an action of Debt brought by the Plaintiffe againſt the Defendant, for money won of him at play, the Defendant prayes that he may be admitted to wage his law, and upon this prayer, the Court gives him a day for to perfoꝛme this, and at the day aſſigned, he by his Councell moves the Court, that he may have the benefit, foꝛ to waive the wager of his law, and to have the matter tryed by the Countrey, unto this the Plaintiffe refuſed to conſent, being demanded by the Court, and therefoꝛe by the Rule of the Court, a defecit de lege, and his non-appearance was recoꝛded. Note, that Waterhouſe an Officer of the Court, and Clerk of the Cꝛown office doth lay, and affirme, that by the Courſe of the Court, the Defendant might at any time, without the aſſent of the Plaintiffe, waive his wager of law, and ſtand to a triall by the Countrey, but notwithſtanding this his Infoꝛmation, the Rule of the Court was entred, ut ſupra.

Defecit de lege entred.

## Sir *William Herberts* caſe.

Note the courſe of the Court to be obſerved. &c.

NOta per Curiam foꝛ a Rule of the Court, to be duly obſerved by all, that in not purſuing the oꝛder of the Court upon the filing of a Declaration againſt any priſoner, being in the Marſhalſie, for to pꝛoceed unto Judgement, upon a Nihil dicit, befoꝛe due notice given to him, of all the whole pꝛoceedings had againſt him, that ſo he may appoint an Attuꝛney, and if he will have no Attuꝛney, then to ſend unto him a Copie of the Declaration againſt him, and ſo was it done in this caſe of Sir William Herbert, who was brought hither by a Habeas corpus, in December laſt, and was had to the priſon of the Kings Bench, and that a declaration was filed againſt him at the ſuite of I. D. in Mich. Term before foꝛ a Debt of 200 l. foꝛ money won at Dice, ) and that in Termin. Paſch. pꝛoximè ſequent. he had got a Judgement againſt him, by a Nihil dicit, and this without any notice at all given to him, oꝛ to his Attuꝛney, he having an Attuꝛney that dealt foꝛ him, and foꝛ this matter and great abuſe, by theſe undue pꝛoceedings againſt him—Whitlocke did moꝛe the Court, on the behalf of Sir William Herbert, to have a ſtay made of entring of the Judgement, and alſo to have an Attachment againſt the partie who had in this undue manner pꝛoceeded againſt the expreſs oꝛder and Rule of the Court, the whole Court did veꝛy much diſlike of theſe pꝛoceedings, and did theꝛefoꝛe ꝛeferre the examination of the whole matter unto Mr. Man. Secundary of the Couꝛt foꝛ to examine the ſame, and to certifie and infoꝛm the Court of the whole pꝛoceedings, and if this pꝛove to be true, accoꝛding to the Information, that he came in by a Habeas corpus, in December, and the Declaration filed againſt him, in Mich. Terme before, and this againſt him as being in Cuſtodia mariſcalli, when he was not then in his cuſtody, if this appeares upon examination to be ſo, the pꝛoceedings are veꝛy illegall, and there will then be juſt cauſe to ſtay, and to ſuperſede the Judgement, and to grant an Attachment againſt the partie, to anſwer theſe his unjuſt and illegall pꝛoceedings, and to be puniſhed foꝛ the ſame.

Note the courſe of the Court for amending, &c.

Note, that Man. Secundary did infoꝛme the Court of the courſe of the Court to be obſerved, unto which the whole Court did agree, and that for a Rule of the Court foꝛ to be duly obſerved, foꝛ the future. That after a plea here entꝛed in this Court, at any time before the Replication of the Plaintiffe, the Defendant may either amend his plea, as he ſhall be adviſed by his Councell, oꝛ elſe he may put in a new plea, if he ſhall be ſo adviſed.

*Warraine*

## *Warraine* Plaintif against ——— Defendant.

NOte, that upon a Judgement given here in B. R. a Scirefacias issues, & the same returnable in this Term by the Rule of the Court, the return of this cannot be staied, but in favour of Purchasers, when the Return is filed, the Court may then give a longer time to put in their plea to the Scire facias, and likewise for to imparle, the motion was made to stay the return of the Scire facias from being filed, which the Court would not grant.

The return of a Scire facias no to be stopped from filing.

## *Morgan* Plaintif against *Soke* Defendant, entred *Mich.* 9 *Jac.* B. R. *Rott.* 95.

IN a Writ of Error for to reverse a judgement given in the Court of C. B. in an Action of Debt there brought by the Plaintiff against the Defendant, as Administrator of I. S. who pleads that before the Writ purchased, the administration to him was revoked, and committed to another, and saith that at the time of the Writ purchased, he then had in assets in his hands, to the value of 200. l. in money, but before the judgement given against him, he had delivered this over unto the new Administrator, and all this being so confessed, the Plaintiff said that this revocation, and assignation, and all that was thus acted and done between them, was by fraud and Covin between him, and the partie to whom the second Administration was granted, he being his Brother, and upon this they were at issue, and the Jury did find the Covin, and gave a Verdict for the Plaintif, and against the Defendant, and upon this verdict, Judgement was given in the C. B. for the Plaintiff quod recuperet debitum de bonis testatoris, & ceo absolutely, upon this Judgement a Writ of Error was brought here in B. R. and the error assigned was, because that the judgement here given was absolute, whereas it ought to have been conditionall (s.) si tantum, &c. the whole Court did very much disallow of this error, and all the Judges did hold cleerely, that the Judgement being absolutely given was good, and not erroneous, and they were not to be constrained in this case for to give a Judgement conditionall, but their generall Judgement was good, and so by the Rule of the whole Court the judgement was affirmed.

A Writ of error to reverse a judgement, &c.

Judgement affirmed per curiam.

## *Dingley* Plaintif against Sir *James Creyton*, and ——the Manucaptors of ——— *Wade* Defendants.

NOte, that in an Audita quærela, the course is for to take baile by Manucaptors by Recognisance, for to prosecute cum effectu, and upon the whole matter, the case appeared to be this, that Wade, a feme covert did acknowledge a Statute, the Husband died, the Wife was taken in execution by her body, and thereupon brought her Audita quærela, and therein sets forth, that when the Statute was by her acknowledged, she was then a feme covert, and that upon this she was let to baile, and baile taken, and averred, that the money in demand was paid, and satisfied in the life time of the Husband. Geo. Croke moved the Court for stay of the Scire facias, which was to issue forth upon breach of the Recognisance,

A Feme covert acknowledged a statute, &c.

untill triall was had of the former matter in iſſue, the iſſue to be tried, being, whether at the time of the Statute acknowledged, ſhe was a feme covert or not. Yelverton moved the Court againſt the Manucaptors, becauſe the proceedings had not been purſued cum effectu a whole year, and more being paſſed, and nothing at all done, ſo that by this Laches, there is a forfeiture of the recogniſance. The Court was moved by the other ſide, for to have a continuance of their ſuit to be entred. Yelverton then moved the Court, and prayed, that upon a continuance entred of the matter and ſuite, that there be alſo a Recordatur entred for their benefit, as to the forfeiture. Yelverton Iuſtice, if there be in this caſe a lawfull forfeiture of the Recogniſance, there is no reaſon that the Act of the Court, by an entrie of the continuance of the ſuit and triall, ſhould deprive the other of the benefit which the Law gives unto them, in caſe there be cauſe of forfeiture of the Recogniſance. Williams Inſtice, they might here in this caſe have moved the Court for to have had a Diſcontinuance of the ſuite entred, but ſeeing they have omitted this, the other may now well move the Court for to have a continuance of the ſuite entred, and this may well be done by the Court, without any entrie of a Recordatur of the forfeiture. Upon this, Mann. the Secundary being by the Court demanded how the Preſidents, and uſages had been in ſuch a caſe, who thereupon anſwered, that all the Preſidents and uſages in this, and the like caſe, is wholly in the power and diſcretion of the Court, to cauſe ſuch an entrie to be made of the continuance of the ſuite, with a Recordatur, or without the ſame, as the Court ſhall ſee cauſe, and if they cauſe an entrie to be made of the continuance of the ſuite, with ſuch a Recordatur, the ſame is then ſo done by the Court, in favour of the partie, who is to have the benefit by the forfeiture, and therefore in this principall caſe, by the rule and direction of the whole Court, an entrie was made of the continuance of the ſuite with ſuch a Recordatur as was prayed of this forfeiture, and a Day appointed by the Court for triall of the iſſue.

Where a continuance of a ſuite may be entred, with or without a Recordatur.

Note, that the Court was informed, that one Sir Anthony Aſhley had brought the Recogniſance, which was forfeited out of a purpoſe and intent for to vex the Manucaptors, and did proſecute a ſuit againſt them upon the ſame. As to this, Williams Iuſtice, it is very cleere that a man may buy, or purchaſe in a Recogniſance, or a Statute, thereby to free and diſcharge his own land, from the execution of another, or to prevent ſuch a charge, he may well buy, or purchaſe in ſuch a Recogniſance, or Statute, and may by this charge his own land by another, and may procure a friend to purchaſe this in for him, and ſo to extend the ſame upon his Land, thereby to prevent ſuch a charge by another, but not thereby for to charge or moleſt another with it. And in this caſe it was agreed by all the Iudges, that upon triall of the iſſue, it went againſt the woman, execution cannot again be ſued againſt her but for the whole, the ſame ought for to be ſued againſt the Manucaptors, & their Recogniſance (being the ſumme which the debt is) the ſame is to be extended for it, if the matter in iſſue be found againſt the woman, but not otherwiſe, for the forfeiture, for that they ſhall be but once charged, and if the matter in iſſue upon the triall, be found for the woman, her Manucaptors are then to be clearely diſcharged, by the opinion of the whole Court.

Prohibition to the high Commiſſion Court for holding plea of incontinency.

Nota, by the opinion of the whole Court, that the High Commiſſion Court, will not, neither can they there proceed in the determination of a matter, as touching incontinency. Geo. Croke moved the Court for a Prohibition, becauſe, that as he alledged, they would proceed there in ſuch a caſe of incontinency, the Court denied for to grant a Prohibition, becauſe they conceived that they would not hold plea in ſuch a caſe, and adviſed them for to ſuggeſt this matter there unto them, and if they would not allow of it, the Court would then grant a Prohibition.

Horne

## *Horne* Plaintif, againſt *Harriſon* Defendant entred Hillar. 8. or 9. Jac: B. R. Rott. 552.

IN a Replevin, the Defendant juſtifies the taking, for that I. S. was ſeiſed of the Land in fee, where the taking was, and that he as his ſervant and by his command did take, and diſtraine the Cattell there, damage feſant, and ſo juſtifies, the Plaintiff to this replies, and ſaith, that true this is which is alledged, but ſaith further, that long time before I. D. was ſeiſed in fee of the ſame land, and thereof made a leaſe to him ut will, and takes a Traverſe in this manner, abſq; hoc, that I. S. did command him for to enter, and to take the cattell, to this Replication, the Defendant demurres in Law, and the Plaintiffe joyned in demurrer, the only matter in queſtion and inſiſted upon, was, touching the validitie of the Traverſe: by the opinion of the whole Court, the Traverſe was ruled good, for that the Plaintif here in this caſe could not Traverſe any other matter, but the command—Mann. Secundary informed the Court, that if it had been in caſe of a Leaſe for years, or for life, then in ſuch a caſe the Seiſin of the other ought to have been traverſed, and not the command, and ſo it hath been here adjudged before, but otherwiſe in caſe of a Leaſe at will made, as here in this; caſe the Court agreed in this, and ſo this Traverſe being here ruled to be good, Judgement was given for the Plaintiff, and to have a return of Cattell.

A Replevin for Cattell, Defend juſtifies as ſervant. &c.

A Traverſe to the command of a ſervant to enter, &c.

Judgement for the Plaint. and to have a return.

## *Hamlen* Plaintif, againſt *Hamlen* Defendant entred Hillar. 9. Jac. B. R. Rot. 695.

THe caſe appeared to be this, an Infant Plaintiff appears by his Atturney, and is his Replication, this ſo appears, afterwards the Plaintiff became Non-ſuited in the Action, and coſts given againſt him according to the Statute of 4. Jac. cap. 3. afterwards the Plaintiff by his Counſell moved the Court to have ſome mitigation of the Coſts, for this cauſe, for that the Proceedings by the Plaintiff, being an Infant, were by Atturney, the Court denyed to mittigate the Coſts, for now after Non-ſuite and coſts given according to the Statute, the parties are out of Court, and the Plaintiff hath now pretermitted his time, and that he being Plaintiff, this is his own Act for to be Non-ſuited, and the Court declared, that after his being Non-ſuit, they could not in this caſe give him any remedy. It was then ſaid privately, that they would have remedy by bringing of a Writ of Error. Man. Secundary made anſwer to them, that by a Writ of error, they could not in this caſe have benefit after a Non-ſuit. Nota, that upon an evidence given to the Jury at the bar, for the triall of a ſuppoſed forfeiture by a Coppiholder of this Coppy. eſtate, being of a Coppi. Man. of the Lord Mountagues, the point & proof of the forfeiture was in manner, as it here expreſſed (s.) That one came to the Lords Court with a ſtranger, who was not known to the Homagers, nor was ever ſeen before, or after, by any of them, be there in the Court of the Manor, before the Jury, and Homage, did ſweare and depoſe, that I. S. a Coppyholder of the ſaid Manor, had made a leaſe for years of his Coppihold Land, by words, for to begin at Mich. then next enſuing for ten years, contrary to the cuſtome of the ſaid Manor, and ſo a forfeiture, and ſo upon this oath taken before the Homagers, they found, and did preſent the forfeiture, one witneſſe did teſtifie that he had promiſed the other to make ſuch a leaſe to him, but that after this promiſe, he continued ſtill in poſſeſſion, for the ſpace of 9. years before his death, and ſo thereof died ſeiſed, the Land was of the nature of Burgh Engliſh. The Lady Mountague did proſecute for the forfeiture. It appeared upon proof, that the Coppyholder had drawn a leaſe of his freehold land, & of his Coppyhold Tenement alſo, but that he never ſealed the ſame, & to avoid a forfeiture, it appeared, that he made a leaſe for 1. year only of his coppi. land according to cuſtome, and covenants with the Leſſee, that he ſhall enjoy this Land, &c

An infant pla. appears by Atturney, &c.

What ſhal be ſaid to be a forfeiture of a Coppihold eſtate, and what not.

de anno, in annum, during 10. yeeres, this was only by way of Covenant, and that for this he had 20.l. in hand payd him, and did Covenant, that if he did put him out, after one yeare, or at the end of any one of the yeeres, and not ſuffer him for to enjoy all the land that then the 20. l. which he had ſtill before hand, ſhould be accounted for the rent, of the laſt half yeare, ſo that he had no certaine terme made to him by the Coppyholder, of his copphold eſtate, and whether upon the whole matter, as the caſe appeared to the Court, upon the evidence to be, this act of the Coppyholder ſhall amount to make a forfeiture of his Coppyhold eſtate was the queſtion. The whole Court was cleere of opinion, that for a Lord of a Mannor to avoid a Coppyhold eſtate, for a forfeiture by making of a leaſe of his coppyhold land contrary to the cuſtome, there ought for to be very direct, and certayne proofe made, of a certaine leaſe, with a certaine beginning, and ending of it, and ſo in like manner of any other thing ſuppoſed to be acted, and done, by a Coppyholder, and contrary to the Cuſtome of the Mannor, thereby to make a forfeiture of his Coppyhold eſtate, this muſt all appeare certainly to the Court, and the oath of a ſtranger made in the Lords Court, to this purpoſe, ſhall not be of any force, or effect, to prove a forfeiture, eſpecially, when the Coppyholder ſtill continues in poſſeſſion, and ſo dyes ſeiſed of his Coppyhold eſtate, and this never came in queſtion till after his death. And if ſuch a preſentment as this was, in the Lords Court ſhall be allowed of, upon ſuch an oath made by a ſtranger, as to make a forfeiture of a Coppyhold eſtate, every Coppyholder then might be in continuall danger to loſe his Coppyhold eſtate. The Court did alſo clearly agree, that if the Coppyholder did promiſe for to make ſuch a leaſe, and it is not proved in facto, that he did make the ſame, this is no cauſe for to make a forfeiture of his Coppyhold eſtate. Croke Iuſtice, If any ſuch leaſe was made, as is here alledged, if it appeares, that this was made in the time of the Lord Mountague, Lord of the Mannor. So that the forfeiture, if any were, was in his time, and ſo take the caſe to be this, that a Coppyholder makes a leaſe of his Coppyhold land, and ſo a forfeiture being contrary to the cuſtome of the Mannor, if after this he continues ſtill in poſſeſſion, and the Lord of the Mannor dyes, and afterwards his widow, or he which hath the Mannor, doth receive rent from the Coppyholder, it is cleere that he ſhall never after this acceptance of rent, take any benefit, or advantage of the forfeiture, and ſo it might be here in this caſe, for here it was the Lady Mountague that did queſtion the Coppyholder for this forfeiture in this caſe now in queſtion, this preſentment was made long time after the ſuppoſed forfeiture, and then the Coppyholder being dead, his heir was but a yeare old, and had not there any Councell to ſpeak for him, when the preſentment was made, and ſo they preſented the forfeiture. The Court did very much diſlike of the proceedings in this caſe, againſt the Copipholder. Williams Juſtice, magna eſt veritas & prævalebit, The Court then ſayd to the Jury at the bar, that here appears no proofe at all to be made of this leaſe alleged to be made by the Coppyholder, and if there was a leaſe by him made there, yet no forfeiture, and according to this direction of the Court, the Jury did find for the Infant Coppyholder, againſt the Lord, that there was no ſuch Leaſe made by the Coppyholder, as was perſented for to make a forfeiture, and ſo to intitle the Lord to the Coppyhold eſtate. Yelverton Juſtice, If a Coppyholder makes a leaſe for one yeere, warranted by the cuſtome of the Mannor, & ſic de anno in annum, during 10. yeeres, this is cleerely a good leaſe for 10. yeers, and ſo ſuch a leaſe made by a Coppyholder, will make a forfeiture, of his coppyhold eſtate, but if he makes a Leaſe of his Coppyhold land for one yeere, and Covenants that after the end of this yeere, he ſhall have the ſame for another yeere, and ſo in this manner de anno, in annum, during the ſpace of 10. yeeres, this is no ſuch leaſe, as ſhall make a forfeiture of his Coppyholde eſtate for that here he hath no lawfull leaſe, but for one yeere only, the Court agreed with him herein, and as touching the like leaſe, ſee 28. H. 8. Dyer. fo. 24. placito 151. & Plowdens Commentaries fo. 273. b. in Say, and Fullers caſe, & 14. H. 8. fo. 14. b. &. Coke 6. pa. fo. 35. 6. in the Biſhop of Bathes caſe.

What ſhall make a forfeiture of a Coppihold eſtate, and what not.

The Biſhop of Baths caſe.

## *Price* Plaintif againſt *Atmore* Defendant entred Trin. 8. Iac. B. R. Rot. 439.

An action of Treſpaſſe and ejectment, &c

IN an action of treſpas and ejectment, the Plaintiffe declares of a leaſe made unto him by one Smith, and upon Not-guilty pleaded, the Jury found a ſpeciall verdict, upon which ſpeciall verdict, the caſe appeared to be this. The Lord Windſor being ſeiſed of land. (being the land in queſtion) 13. Eliz. did make a leaſe of this Land unto Thomas Moore for the terme of 60. yeeres, by force and vertue of which leaſe Thomas Moor poſſeſſed, did make his laſt will and teſtament, and thereby did deviſe the ſaid term, and the occupation thereof, during all the ſayd yeeres, and all his intereſt therein, unto Margaret his wife, if ſhe ſhall ſo long live, and continue ſole, and if ſhe dyes within the terme, then he deviſeth all the reſidue of the yeeres then to come unto John his ſon, and to the heires of his body, and makes Margaret his wife ſole executrix of his will, and dyes, Margaret the executrix enters eſpecially, claiming this terme as a Legacy, John the ſon dyes (having) iſſue leaving his mother, (the firſt deviſee) and makes his wife executrix of his will. Margaret, the firſt deviſee, makes her will, and dyes within the terme, and before any aſſigenement made of the terme, the executor of Margaret, aſſignes this terme over unto Atmore the Defendant, the widow, and executrix of John, with her ſecond husband, aſſignes this Leaſe over unto Smith, the Leſſor of the Plaintiffe, ſo that the onely point in queſtion was, whether of theſe 2. aſſignees ſhould have the reſidue of this terme, the determination of which queſtion reſts only upon the conſideration of the validity of the ſecond deviſe, of the reſidue of the terme, unto John the ſon, whether the ſame were good, or not, and whether the mother, being the firſt deviſee, by her act, may prevent this ſecond deviſe, whether the executors of John, and their aſſignee, being the Leſſor of the Plaintiffe, ſhall have this contingent remaynder in the terme, John being dead in the life time of Margaret, the firſt deviſee upon the firſt opening of this caſe, the whole Court were cleere of opinion, that the executrix of John ſhould not have this, for that by the death of John, in the life time of his mother, the firſt deviſee, and ſo before the poſſibility did fall, this poſſibility is now quite gone, and to this purpoſe was cited Welcden, and Elkingtons caſe in Plowdens Commentaries fo. 520. 521. 522. & 523. and Coke 1. pa. fo. 154. 155. the Rector of Chedingtons caſe, Brookes caſes, 33. H. 8. fo. 48. placito 209. temps H. 8. fo. 74. placito 334. 2. E. 6. Br. caſes fo. 84. placito 388. 28. H. 8. Dyer placito 7. 6. E. 6. Dyer placito 74. et 4. Mariæ Dyer, placito 140. the words here in this principal caſe were, that the wife of the deviſor, by the deviſe ſhould have, occupie, and injoy all his intereſt in the term, if ſhe ſhould ſo long live, the Court upon that which was now urged, was of opinion, that the aſſignee of the executor of Margaret, the firſt deviſee ſhould have the remainder of the Term; but the Court at this time would not over-rule the ſame, but gave further time, for the arguing of it, and accordingly, at another time. (s.) Termin. Trin. 10. Iac. Br. Mr Daſon of the Middle Temple argued for the Plantiff.——In this caſe theſe two queſtions are conſiderable. Firſt, whether this deviſe in remainder of a Term be good, or not. Secondly, admit this deviſe of the remainder be good to the ſon, then when he dies in the life time of his Mother, the firſt deviſee, and who dies alſo, within the Term, whether the executrix of the ſon, ſhall have the reſidue of the Term by this deviſe, that the executrix of the ſon ſhall have the ſame, and ſo conſequently, the Plantiff here hath a good title to him derived from the aſſignee of the executrix of the ſon, and the Deviſee in remainder, the determination of this, reſts only upon the true conſtruction of this Will made by Thomas Moore, 7. E. 6. Brooks caſes, fo. 95. pla. 437. Brook tit. Grants pla. 154. & Brooke title Leaſes pla. 66. a man poſſeſſed of a Leaſe for 40. years, grants ſo many of the years as ſhall be behind, at the time of his death, this is a meere void grant for the incertaintie of it, but ſuch a Deviſe by Teſtament is good, 10. Eliz. Dyer pla 272.

The point in the caſe.

* This booke hath not law. p Curi. Cro. 2 pt. Sherif. & Wotheny caſe 510.

Termin. trin. 10. Iac. B. R. this caſe was argued again.

I.

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a Termor grantes his Term, Habendum after the death of the Grantor, this is a void Habendum, and the Term passeth presently by the Premises, as it is there adjudged, but all this in case of Grants, as to construction of Wills, such a remainder limited upon a Grant, is void, but otherwise it is in case of a Will, and the reason of this is given in Paramour, and Yardleyes case in Plowdens Commentaries fo. 540. because that the makers of Wills for the most part are ignorant of the Law, and of the Rules of Law, and in this regard, a favourable construction is to be made of Wills, and they are are to be construed according to the intent and meaning of the Testator, in 38. the Book of Assises pla. 3. & 39. the Book of Assises pla. 17. & Perkins fo. 104. pla 541. a man devises, that his Executors shall sell his land, and distribute the profits for his soule in pious uses, (distribute) the Judges expounded this for to be a conditionall estate, and fee simple (as it is in Littleton fo. 9. pla. 383.) that if the Executor do not sell, the heire shall enter, and so in Paramour, and Yardleyes case before remembred, where a man devises Land to one and his heirs, and in the latter part of his Will he grants a rent to another, this latter Grant, and devise by the intendment and construction of Law, shall be first according to the intent and meaning of the Devisor, otherwise this devise of rent out of land before devised, shall be void, 2. E. 6. Brook title Devise, pla. 13. a man devises the occupation of his Plate to one for life, and that afterwards this shall remain unto another, this is a good remainder, 33. H. 8. Brooke title Done, placito. 57 & Brooke title Chattels pla. 23. Lessee for years devises Term, or other his Chattels or goods to one for life, the remainder to another, and dies, the Devisee enters, and doth not alien the Term, nor give, sell, nor yet forfeit the goods, he in the remainder shall have the same, but if the first Devisee doth sell, give, or forfeit them, he in the remainder is then without remedy, 28. H. 8. Dyer pla. 7. a. Termor devises his Term to his eldest Daughter, and to her issues, the remainder to his youngest Daughter, the eldest dies without issue, her Husband aliens, by Baldwyn and Shelley, the younger Daughter is without remedy, because it was a void remainder of a Term, as it is of a Chattell personall: Englesfield to the contrary, by reason of the intent and meaning of the Devisor 6. E. 6, Dyer pla. 74. Lessee for years devised his whole Terme to A. proviso, that if he dyes living I. S. then the residue for to remaine to I. S. A. aliens and dies, I. S. is without remedy, 4. Marie Dier placito 140. he in the remainder is without remedy, where the first devisee aliens, Coke 4. pa. fo. 66. b. in Fulwoodes case, resolve that such a remainder man, cannot assigne his remainder over, before it happen, the same being but a bare possibilitie, and not assignable over, Coke 8. pa. fo. 96. b. en Mannings case, where it is said, that it lyeth not in the power of the first Devisee to barre him, which hath the future devise, for that he cannot transfer more over unto another, then he himself hath, as it is there resolved, Mich 26. and 27. Eliz. in the Kings Bench, Thomas Perpoint Lessee for 99 yeeres, devised this Term in these words. I devise my lease to my Wife, during her life, and after her death, I will, the same to go to her Children unpreferred, makes his wife his Executrix, and dies, she enters, and possesseth her self, ratione doni, & legationis, and marries with Sir Thomas Fulleshurst, against whom one recovers 140. l. debt in the Court of C. B. and by force of a Fieri facias to the Sheriff, the term was sold, the Wife dies. First, in this case it was resolved, that there was no difference, where the Terme, and where the use and occupation of the Term devised, and with this agrees the third Resolution in Mannings case, Coke 8. pa. fo. 95. b. Second Resolve, that by the sale, either by the Wife, or by the Sherif, by force of the Fieri facias, after that the Wife was of this possessed, as of a Legatory devise, this shall not destroy the Executory devise, although that the person to whom this was devised, was then uncertain, as long as the Wife was living, and that this possibility cannot be defeated by any sale made by the first devisee, all which appears in Mannings case. The second Point here is, whether the Executrix of John Moore, shall be in the same degree here, as the Testator was in, that shee shall be in the same degree, wherein it is

Paramour and Yardleyes case, &c.

Paramour and Yardleyes case.

Coke 4. pa. fo. 66. b in Fulwoods case.

Coke 8 a. pars fo. 96. b. Mannings case.

Coke 8. a. pa. fo. 95. b. Mannings case.

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to be considered, whether this be an interest in John Moore the Son, or a contingent possibility, this is an interest in him, and not a contingent possibility, and then the same is well assignable over, and so the Plaintiff coming in under the Assignee, hath a good title, and so prayed judgement for the Plaintiff. Williams Justice, the Executor may have a possibilitie, if a Lessee for years grants this to one if he shall live so long, this is good here in this Principall Case, this is an interest in the Devisee John, and not a possibility, it appears by Welcdens case in the Commentaries, that a Devise shall have a reasonable intendment, and construction, as by construction to have the latter words in a Will placed first, and it is not strange that two may have an interest in one and the same thing, here John the Son had a good interest in him, the which shall go to his Executor, and here the words Heires, are words of limitation, but not of estate. Hen. Yelverton argued for the Defendant, three points have been here moved in this case: two of which are to be agreed, but not the third, and that this is only to be argued, being the sole point, that the Will here is good, is not to be questioned, and that the Sonne here was likewise to have the remainder of the Term, after his Mothers death, this is very cleere, and no waies to be questioned, but when Iohn the Son dies, (as in this case here he did) living his Mother, and before his remainder did fall, whether his Executor now shall have this, is the sole and only question considerable in this case, and here the Executor of the Son shall not not have this, and then consequently the Assignee of the Executor being the Lessor of the Plaintiff can have no title, nor the Plaintiff under him, and in this case it is to be considered, whether at the first by this Will, Iohn Moore the Son had a bare possibility, or an interest, if no interest, but a possibility, then Welcdens and Elkintons case in the Commentaries, is our expresse case in terminis, and the Judgement given there in that case, is a judgement in point for the Defendant here, and the reason given there makes for the Defendant here; there it is said to be an interest, and therefore the Son to have it, and so his Executor, if he dies before it happen, but here it is no interest, but a bare passibilitie in the Son, as it is now agreed at this day, and so was it held Pasch. 25. Eliz. in the C. B. in Carters case, and in Hemmingtons case 29. Eliz. in both of them adjudged that a release of this is void, and therefore no interest, Coke 4. pa. 4. 66. b. in Fulwoods case, our case is there put for to be a possibilitie, and so this not to be granted by the Son, in the life time of the Mother, nor yet to be released; ex hoc sequitur, this can be no certain interest, but only a bare possibility, the which cannot go to the Executor. It appears by the Rector of Chedingtons case, Coke 1. pa. 24, 25. that a contingentie shall not go to an Executor, here in this principall case there is only a possibilitie in Iohn the Son, and no interest, because that the Wife may survive the Son, and live out the whole term, and then nothing can come to the Son, and therefore this doth sound to be only in possibility, and not in interest, also the Executor is not to have any thing, if there were not an interest in the Testator, or that the same hath relation to some former grant, here, this estate, which Iohn the Son is to have by this devise, the same is not by him, grantable over, releasable, extendable, or assignable, and therefore this was no interest in him, but a possibility, and so when he himself dies, before this happens, this shall not go unto his Executor, and so the Plaintiff claiming under an Assignee of the Executor of Iohn can have no good title, and therefore he prayed Judgement for the Defendant. Flemming chief Iustice, Iohn Moore the Son by this devise, hath nothing but a bare possibilitie, he hath no manner of interest, but upon a meere contingent, and casualtie, and he dying before this falls, it is very plain and cleere, that his Executor shall not have this possibility. Williams Iustice, it may be made a good question, whether this remainder of a Term be good or not, and in this there will be a difference, where a man doth grant the Land it self, and where the Term, Edwards case put Coke 1. pa. fo. 25. in the Rector of Chedingtons case was adjudged contrary to Welcdens case in the Commentaries, a Term granted to one,

Comment. Welcdens case.

Welcden & Elkintons case in the Commen. fo. 516, 517.

Hemmingtons case. Fulwoods case.

Chedingtons case.

Edwards case pur Coke 4. pa. fo. 25. in the Rector of Chedingtons case.

if he ſhall live ſo long, and that if he dies within the Term, that it ſhall remain to another, this was reſolved in Iewell and Sparkes caſes to be a void remainder, for here de minimis non curat Lex, the law makes no account of a remainder, upon a leaſe for years, after the life of another. Flemming chief Iuſtice, Iohn the Son hath here by this deviſe, a good poſſibilitie in remainder of the Term, but where he dies before the ſame falls, as in this principall caſe here he did, this ſhall never go unto his Executor. Williams Iuſtice, there will be a difference, where one hath a Term for years, and doth deviſe the Land to another for ſuch a time, if he ſhall live ſo long, and if he dies within that time, then the ſame for to remain to another, this is a good remainder, but otherwiſe it will be, if he deviſeth all his intereſt in the Land, to one for life, and if he dies within the Terme, then the ſame to remain to another, this is a meere void remainder, for that no remainder here can be of this, after a life in being. Flemming chief Iuſtice differed in opinion herein, that ſuch a remainder of a Term is good, but that the ſame ſhall not go to his Executor, where the Teſtator, that had the Remainder died before the ſame happened, as it fell out in this principall caſe, and in this all the whole Court were of opinion againſt the Plaintiff, that this Executor of Iohn the Son ſhould not have this poſſibility, in regard that the Teſtator which had the remainder, died before the ſame happened, and was attached in him, and ſo the Plaintiff claiming under the Aſſignee of the Executor of Iohn the Son, who made the leaſe to him hath no good title, and therefore by the Rule of the whole Court, judgement was given for the Defendant, and ſo entred (s.) quod querens Nil capiat per billam.

Jewell and Sparkes caſe.

Note the difference where a termor doth deviſe the Land to one, and where his whole, &c.

Judgement for the Defen. &c.

Nota, by the whole Court, that in an Action of Debt, where the Defendant may wage his Law, if he confeſſeth part of the Debt, and wages his Law for the reſidue, and a judgement is given and entred for the Plaintiff, for that which is confeſſed after this judgement, the Plaintiff cannot be Non-ſuited as to the reſidue, but he ought to appear, when the Defendant comes for to wage his Law, for this part of the Debt.

Nota, touching ley gager.

Nota, that where the King is partie in a triall here, if the other ſide challenge a Juror, he ought here to ſhew his cauſe of challenge preſently, and two Triors ſhall be choſen (s.) the two former which are ſworn, and they are for to informe the Court, whether for this cauſe ſhewed, or for any other cauſe, the Juror challenged be indifferent or not.

Nota, as touching matter of challenge, &c.

## The King againſt *William Levet* Defendant

In a Quo warranto brought for uſurpation of divers Liberties within the Town of Petworth, as the Bailiwick, the keeping of a Faire, and Market there, and the ordering of the Market, and taking of Tolle of all, &c. The Defendant juſtifies under the title of the Earle of Northumberland. This was tried at the Bar by a Jury of Suſſex, the Defendant in his juſtification, ſhews the right and title of the Earle to be this, (s.) 5. Ph. and Mar. the honour of Petworth was by Act of Parliament conveyed unto the ſaid Earle of Northumberland, & hæredibus maſculis de corpore, the remainder to Henry Piercy Eſquire in taile, with all Markets, Faires, Bailiwicks, Tolles, &c. the which Earle died, and this deſcended to the now Henry Earle of Northumberland, as Son and Heire of the ſaid

A Quo warranto for chaiming of liberties, &c.

The Earle of Arundel againſt the Earl of Northumberland upon the matter.

ſaid Henry Piercy, and ſhews that ſuch liberties, and privileges he had within the Town of Petworth, and that there being an Officer called the Baily and Portreen of Petworth, and that as incident to this Office, he had the overſeeing of the Markets, and Faires there, and alſo to take Tolls of every one, &c. by reaſon whereof he did take tolle of ſome of the Tenants of the Earle of Arundell, and hereupon this matter came in queſtion, and that chiefly between the two Earls, whether this taking of Tolle was lawfull or not, and the chief matter in iſſue was, whether the Mannor of Petworth be within the honour of Petworth, and then Secondly, whether there be any honour of Petworth, or not, and if there be, then the matter in Law was, whether this honour of Petworth, was held of the honour of Arundell, or not: And thirdly, whether there was ſuch an Office of Bailewick, and if there were, and if there were ſuch an Office, whether the ſame was within the Town of Petworth, and then whether they have uſed to take Tolle of all perſons, or not, and whether they have uſed to take Tolle of the Tenants of the honour of Arundell. For proof that Petworth was an honour: Firſt, there was ſhewed the grant of H. 2. ſonne of Maude, the grant and confirmation by H. 2. Dux Normandiæ, de honore de Petworth, and there it is called an honour, and a Barony in the time of Rich. 2. who made a gift, and grant to John Holland, Duke of Exeter, of all his Mannors, honours, and Baronies of Petworth, in the time of Rich. 3d. an ancient Book was ſhewed, called Cockermouth and Petworths Books of Demiſes, of the Lands of the Earle of Northumberland, in which he himſelf de tempore, in tempus calls himſelf, Lord of the honours of Cockermouth, and Petworth. In 3. H. 7. 2. Feodarſhip there mentioning his Lordſhip, and honour of Petworth, in 12. H. 8. he is called Lord of the honour de Cockermouth, & Petworth, and ſo in 22. H. 8. and in 32. H. 8. in an Act of Parliament, this is there called the antient Honour of Petworth, and ſo in the Deed of purchaſe of this in 5 Ph. and Mar. it is there called, and ſo paſſed by the name of the antient honour of Petworth, and divers other Mannors, by the ſaid former Act of Parliament were then annexed unto this Honour of Petworth, having but three or foure before. In 19. E. 4. it is there called magnum dominium de Petworth. In 2. H. 7. it is called Petworth cum membris. Hubberd the Atturney Generall, none can claime an honour, but he draw and derive this from the King. And as to the antient Deed produced, to prove this to be an honour in the time of H 2d. It was obſerved by Dodderidge, that he was not King at this time. Hubberd the Kings Atturney Generall affirmed, that there was never any Earl of Normandy ſince the conqueſt, but he was King. Dodderidge cleerely, he was not King at this time, when the grant was made, for he intitles himſelf Dux Normandiæ, and the Deed was to ſuch, & amicis noſtris, after which manner, the King did never write, but would ſtill call himſelf King, and ſo he was then but a Subject, but afterwards he was King, (he was King, before in right) but Stephen was King de facto, and by the mediation of Maude the Empreſſe, his Mother the Dukedome of Normandy was granted unto him, and Stephen did continue King. It was objected, that no Honour can be held, nor created by a Subject, and that a Barony cannot be held of a Subject. Yelverton juſtice, theſe words Dux Normandiæ, & amicis noſtris do make it very cleere and manifeſt, that he was not then King, for there was never any King, that in his grant did write amicis ſuis, but did alwaies name himſelf King. But as to the Objection made by Dodderidge, that in antient times, Kings did alwaies uſe for to put their Seals to their Grants, and to name, and ſet down the certain date of the ſame. The whole Court was againſt him in this. Williams Juſtice, cleerely, a man may have an Honour, or a Barony by preſcription, but he cannot hold a Barony of a Subject, and if one who hath a Barony, doth grant this unto another, this is to be held of the King, and ſo by the opinion of the whole Court, a man may have an Honour, a Barony, or an Earldome by preſcription, but this is to be held of the King. Croke Iuſtice, as to Charter

Touching the honour of Petworth.

In the time of H. 2. grant and confirmation.

ſhewed of H. 2. Charta Henrici Ducis Normandiæ, he was not then King cleerly, for he could not ſo be, during the life of Mawde his Mother, and Stephen was then King by uſurpation, if this was an honour before and afterwards granted over, as it might be, the ſame continues an Honour ſtill, but no Honour can be held of a Subject, but of the King. Williams Juſtice, it is the common uſe of great men, having divers Mannors, for to call one of them his chief Mannor, and his Honour, and ſo to draw all the others, to do, and performe their ſuit and ſervice unto this, and ſo in time, by reaſon of ſuch appellation to game unto him, for this, the name of an Honour, but ſuch Appellation only can be no good proof of an honour. Of the other partie, it was then urged, that Petworth was no honor, but that the ſame was parcell of the honour of Arundell, and to prove this, there was ſhewed an an ancient Book called Extenta terrarum comitatum of the Earl of Arundell, and of 8. Hundreds there named for to be belonging to the Earle of Arundell, and his honour; and Petworth being one of the eighth, it was from hence urged and enforced, that Petworth was no Honour, and that no Honour can be held of another, but here Petworth is held of the Honour of Arundell: and it was from hence enforced, that Petworth was no honour, and there was a Judgement ſhewed in 7. E. 1. That Petworth was parcell of the Honour of Arundell, and the ſame was held of the Honour of Arundell by 22. Knights fees, and that the ſame was never mentioned as an Honour, and that the Earle of Arundell held of the King in capite. Dodderidge objected, that Petworth was no honour, for that it wanted a Court Leet, the which every Honour, of any eſteem, hath unto the ſame belonging. Nicholls Sergeant demanded, whether a Tenure of an Honour by preſcription, might be of a common perſon, or not, he held it well might ſo be. Williams Juſtice, the Act of Parliament recites Petworth for to be an antient Honour, and as an honour in 5. Ph. and Mar. the ſame was then paſſed, and to this Honour, 27. Mannors were then annexed, ſo that if it be proved to be no honour, then this annexation is void, for the Act did not make this an honour. Yelverton Juſtice, an Honour cannot be held of a Subject. The Honour of Dover, and of Wallingford, held of the King in capite. Nicholls Sergeant objected, that the iſſue here being, whether the Mannor of Petworth be parcell of the honour of Petworth, it is by this agreed by both ſides incluſive, that there is a honour of Petworth, otherwiſe the Mannor cannot be parcell of it. Yelverton Juſtice, if no Honour, then no Mannor can be parcell of it. Williams Juſtice, if the Mannor be parcell of the Honour, time out of minde the ſame ought then for to be an honour time out of minde. Two things are here to be proved. Firſt, that this was an Honour, time out of minde. And ſecondly, that this Manror is parcell of it. Nicholls Sergeant, 400. years ſince, in King Stephens time, then it was an Honour, and ever ſince ſo called, and reputed one, and demanded whether an honour, which is one by preſcription, may be held of a Subject, and he thought it might ſo be, but by Dodderidge it cannot. William Juſtice, the King cannot annex unto an honour other Mannors without an Act of Parliament for the ſame. Nichols Sergeant demanded whether the King may create the Mannor of another for to be an honour. Hen. Yelverton, that he cannot, neither can he make my Chaſe to be a Forreſt. Hubberd Atturney Generall, Williams Juſtice, and the whole Court, the King cannot create an Honour, but by an Act of Parliament. Williams Juſtice, Appellation makes not an honour, without other incidents unto it. In the Kings Grants, and Recitals therein to be of the eſtate of the King, where ſuch Recitals are neceſſary, and where not, in matters which do operate by way of diſcharge, there the grant is good by generall words, without any ſuch recitall, otherwiſe where the ſame is for to raiſe a charge upon the Demeſnes in his hands, there the ſame is not good, without a ſpeciall recitall. In this caſe it was well obſerved, that at this day, the Earle of Arundell only hath his Earledome by preſcription, the beginning of which is time out of minde, not within the memory of any one, ſo that his Earledome is the the moſt ancient in the Realm.

Touching the honour of Arundell.

7. E. 1. a judgment, Petworth held of the honour of Arundell by 22. Knights fees.

An honour cannot be made but by Act of Parliament.

Nota

Nota, that the Jury here found Petworth to be an Honour, and alſo that the Mannor of Petworth, was parcell of the Honor of Petworth, they found alſo that there was a Barttwick, and a Perrreere of Petworth, and that they had the ordering of the Market, and Faire, and that they have uſed to have Toll of all (except of the Earle of Arundells Coppyhold Tenants, and free Tenants.) Williams Juſtice, if the Jury are charged with divers iſſues, and bring ready at the Bar to give up their Verdict, the partie cannot then waive any of the iſſues. Flemming chief Iuſtice, & Yelverton Iuſtice of the contrary opinion, that there may be a waiver for the King, and ſo Hubberd Atturney Generall came into the Court, and did accordingly waive divers of the iſſues. It was ſaid, that it appears by proof, that villa de Petworth did hold by 22. Knights Fees of the honor of the Earl of Arundell, but no honour is named to be held of him. Flemming chief Iuſtice, the iſſue was, whether the Mannor of Petworth, be a parcell of the Honour of Petworth, this is an Honour (implicative) agreed by both ſides, for if no honour, then there can be no parcell of an honour: An Honour ought to conſiſt of Lands, Liberties, and Franchiſes, and the Mannors, parcell of an Honour, may be held of the Earl of Arundell, but it may be queſtioned, whether the liberties are held. Flemming chief Iuſtice, if the Verdict be once pronounced, they cannot then take it in part, and wave part of the iſſues, for the Verdict ought to be entire, and ſuch iſſues, for which there was evidence given, ſuch iſſues cannot be waived for the King, when the Jury, after evidence given, are at the Bar for to give up their Verdict, but other iſſues may be waived, as to the Toll, the iſſue was, that they had this of all, as well of the Tenants of the Earl of Arundell, as of other ſtrangers, the Jury do find, that they had the ſame of ſome, that is to ſay, of all ſtrangers, but not of others, that is to ſay, of the Tenants of the Honour of the Earl of Arundell. The whole Court did all agree, that the Jury in this had done very well, and had given a good Verdict, and in this caſe they had found well, and directly, and that their Verdict was according to the evidence, and well purſuing the ſame. Yelverton, Iuſtice if the preſcription had been laid generally, to have had Toll of all the Tenants of the earl of Arundell, this had not been good, but agreed, that the Jury had done very well in this verdict given by them, and in this the whole Court did agree, and accordingly by the direction of the Court, the verdict of the Jury was taken, and ſo entred.

The finding of the jury Petworth to be an honour.

What iſſue may be waived, and what not.

The verdict for the Earle of Northumberland.

## The *King* againſt *Edward* Lord Vaux.

HUbberd the Attorney Generall of the King, did exhibite an Indictment againſt Edward Lord Vaux Lord of Harridon, and this was for his refuſall, to take the Oath of Allegiance, being lawfully offered unto him, accordingly as in this caſe it is provided by divers Laws of the Land, he then being of the age of 18. years and more, this he refuſed to take, and ſo all this was certified to the Court, under the hands of divers of the Priby Councel, 1. Martii 9. Iac. the oath was offered to him at Weſtminſter. The Lord Vaux being preſent at the Bar, was demanded by the Clerk of the Crown, (having read the Indictment to him) whether he was guilty or not, of the matters contained in the Indictment. The Lord Vaux deſired the Court for to aſſign him Councell for to ſpeak for him, he being very ignorant of the proceedings of the Lawes of this Land. Hubberd the Atturney Generall ſaid unto him, that there was no need of Councell for to be aſſigned to him in this caſe, for though he do pretend ignorance in himſelf, in the laws of the Land, (of which no Subject of the Land ought to be ignorant) for that his ignorance of the Law will not excuſe him, if ſo be, that he do offend againſt the Law, but as this caſe is, he cannot be ignorant of the Fact, (s.) of the refuſall by him,

An indictment againſt the Lord Vaux, &c.

him, he having obſerved the time, when this was, the place where, and the perſons who did offer the oath to him, and before whom this refuſall ſo was, and therefore he cannot be ignorant of this, and to this he may well anſwer, without any Councel at all, as to the matter of Fact, (s.) his refuſall to take this oath, whether he had done ſo, or not, and he did therefore preſſe him without any further delay, to make direct anſwer unto the Court, one way or other.

Nota, that for this his refuſall, he was by the Priy Councell committed to the Fleet. Flemming chief Juſtice ſaid unto him, that no Councell in this caſe was requiſite for him, for if he be guilty or not of the matter contained in this indictment, (s.) his refuſall to take the oath, being lawfully tendred unto him, this doth reſt meerely in his own proper knowledge, unto which he may well make anſwer. The Lord Vaux then anſwered and ſaid unto him, that the King gives ſtrength, and life unto the Statute, and that he did never refuſe for to take this Oath, according to the Kings expoſition of it. The Court made anſwer unto him, that this oath ought to be taken by him, according to the very preciſe words of it, and that verbatim as the oath is, and ſo was it fully agreed upon, by all the Parliament, and the ſame is not to be taken in any other manner, and he ſtands here indicted, for refuſing to take the ſame oath, according to the form of the Statute in this caſe provided for, and therefore ought to make anſwer, whether he be guilty, or not guilty of this refuſall. Hubbard the Atturney Generall ſaid unto him, in your anſwer, that you will take the oath, according to the Kings expoſition of it, in this your ſo ſaying, you do offer hereby very great wrong unto the King, for to make others to believe, that the King hath a particular expoſition of this ſtatute to himſelf, and contrary to the ſaid generall Act of Parliament, the which is not ſo, for the King did never make any other expoſition, contrary to the words of the ſaid Statute, neither doth he any wayes allow of the taking of this oath in another manner, contrary to the forme ſpecified in the Statute. Williams Juſtice ſaid unto him, that if he refuſed to take any line, or any word expreſſed in the oath, this is a refuſall of the whole, and ſaid, that this oath was made only, to give unto the King a true teſtimonie, of our true and faithfull allegiance unto him, and that this ſhould be ſo, it doth in a very high meaſure concern the ſafety of the King. The Lord Vaux made anſwer to the Court, that if any part of this Oath did touch the Conſcience of his Subjects, if it be the pleaſure of the King, to make a ſafe expoſition of the oath, he would then take it accordingly, and he ſaid, (and to this the Court agreed) that the King hath ſaid, that the ſole effect of the Statute is, that he may be certified of the true allegiance of his Subjects, and to this he never had, nor will refuſe to take any ſuch oath. Flemming chief Juſtice did preſſe him for to anſwer directly, without any more circumlocution, whether he was guilty, or not guilty, leſt that he by his contempt to the Court ſhould double his offence. Hubberd the Atturney Generall did then move the Court, that if he would make no other anſwer, that then the Court would direct a judgement for to be entred againſt him, that he ſtood mute according to the ſtatute of 33. H. 8. cap. 12. Raſtall in title Triall fo. 415. a bottome. The Lord Vaux made anſwer to the Court, that he would take ſo much of the oath as concerned the Kings temporall juriſdiction. The Court anſwered him, that if he would make no other anſwer, they would then cauſe a Judgement by a Nihil dicit to be entred againſt him. The Lord Vaux then demanded of the Court, whether he ſhould be tried by his Peeres, or not. Flemming chief Juſtice ſaid unto him, that firſt, he muſt anſwer, whether he be guilty, or not guilty: and this being done, he ſhall then have his triall according to the Law, but afterwards, before his anſwer, he ſaid, that he was not here in this caſe to be tried by his Peeres: and upon this, he ſaid that at the Common Law, in theſe four caſes only, a Peere ſhall be tried by his Peeres, (s.) in Treaſon, Felony, miſpriſion of Treaſon, and miſpriſion of Felony, and the Statute Law which gives ſuch triall, hath reference unto theſe, or to other offences made treaſon or felony, his triall by his Peeres ſhall be as before, and to this effect are all theſe Stat. (s.) 32. H. 8. cap.

Stat. of 33 H. 8. cap. 12. Raſtall tit. triall fo. 415. a bottom where one ſtands mute.

Where a triall of a Peere ſhall be by his Peeres, and where not at common law.

cap. 4. Raſtall title fo. 404. placito 10. 33. H. 8. cap. 12. Raſtall title Triall fo. 415. 35. H. 8. cap. 2. Raſtall title Triall fo. 416. and in all theſe, expreſſe mention is made of triall by Peeres. But in this caſe of a Premunire, the ſame being only in effect but a contempt, no triall ſhall be here in this of a Peere by his Peeres. And ſo the whole Court did agree in this, that he could not here in this caſe be tried by his Peeres. Croke Iuſtice demanded of him, whether he did think that the Pope hath any authority, or that any power under Heaven had authority for to draw him, or any Subject whatſoever, from his true allegeance to his Prince, and whether he did think that the Pope could diſcharge him from his oath of allegeance, when he pleaſed. The Lord Vaux made this anſwer, that he neither could, nor would diſpute this, whether the Pope by his Power and Authoritie could diſcharge him of this oath, and further ſaid, that he could not determine of the power and authoritie of the Pope Croke Iuſtice ſaid unto him, that for any one to make any doubt of this, the ſame is a very great ſign, that there is no true allegeance in him. See the Statute of 3. Iac. cap. 4. Raſtall title Crown fo. 88. b. and 7. Iac. 2. and cap. 6. as touching the Oath of allegeance, and the forme of it. The Kings Sollicitor ſaid, that he hath obſerved four ſorts of oathes inſtituted to teſtifie the true allegeance of Subjects to the King. The firſt, was an oath at the common Law, taken in the Court Leet. The ſecond in 28: H. 8. cap. 7. a more ſharpe oath, as touching the Supremacie. Thirdly, 1. Eliz. cap. 1. altering the former Oath of Supremacie in ſome reſpects. The fourth, the oath of Allegeance now in queſtion, inſtituted as before in 3. & 7. Jac. which is a more mild oath then the others, as it appears, and is in maner, agreeing with the forme of the oath taken in a Court Baron. The Lord Vaux made anſwer, that he thought it better to ſwear from his heart, his true allegeance to the King, then to ſwear to a matter of the which, he in his conſcience hath ſome Doubt, and that ſuch an oath by him taken, ſhall be for the greater ſafety of the King. Flemming chief Juſtice then ſaid unto him, that ſeeing he had thus refuſed for take the ſaid oath, as the ſame is ſet down in the Statute, and ſo thereby appointed to be taken, be he thought that he would never truly open and declare the matter contained in his heart, for that he ſo refuſed to perform the outward matter, which ought for to teſtifie his inward Allegeance to the King. The Lord Vaux did afterwards confeſſe the indictment: then Hubberd the Atturney Generall prayed judgement againſt him for the King. Yelverton Iuſtice ſaid unto the Lord Vaux, that nothing was tendred unto him to do, but the ſame which ought to be tendred unto all the Kings Subjects, and further he ſaid unto him, that he, and all thoſe which ſhould offend in this manner, have incurred the danger of a Premunire, the which he hath here by his refuſall for to take this oath of Allegeance, being duly tendred unto him, and therefore he pronounced judgement againſt him according to the Statute of 16. R. 2. cap. Raſtall tit. proviſion and præmunire fo. 328. b. To be out of the King Protection, his Lands, Tenements, goods, and Chattels to be perpetually forfeited to the King, and for to be impriſoned during his life.

Four oaths to teſtifie the allegeance of ſubjects.

Judgement given againſt the Lord Vaux, &c.

## *Mary Semaines* caſe.

IN a Prohibition, where the caſe was, Lands, and goods were deviſed, in one and the ſame Will, which Will was offered to be proved in the Spirituall Court, and hereupon a prohibition was prayed. The Court Cleere of opinion that they are not to prove this Will, for they have no power to meddle with the Probate of a Will concerning the Land, and they cannot prove this Will, as concerning the Goods, without medling with the Land. Flemming chief Iuſtice, the Probate of the Will there for Land, is not ſo much as an evidence to a Jury, to prove the Will. The whole Court agreed, that here was good cauſe of a Prohibition. Clench, one of the Officers of the Court, informed the Court, that

A Prohibition to the Spirituall Court, &c.

that in one Roffies caſe being the like, a Prohibition was granted. Hen. Yelverton ſaid, that Bromley the Kings Sollicitor was wont to ſay, that in ſuch a caſe, the probate of a Will before the Ordinary, being a Will of Land, was of no more force, and effect, then a probate of the ſame before I. S. In this caſe a Prohibition was granted by the Rule of the Court.

A Prohibition granted per curiam.

## *Semaine* Plaintif againſt —— Defendant.

NOta, that in an evidence given to a Jury at the Barre, upon an iſſue—of will or no will, the queſtion moved to the Court was this. A Coppyholder ſurrenders to the uſe of his laſt Will, whether the land doth paſſe by the ſurrender, or by the Will. Williams Iuſtice, it is very cleere that the Will is only declaratory, declaring the uſes of this ſurrender, nothing doth paſſe by the Will, but all doth paſſe by the ſurrender, Coke 6. part fo. 18. in Sir Edward Cleres caſe, one doth covenant to ſtand ſeiſed to the uſe of his laſt Will, or makes a Feoffement in fee to the uſe of his laſt Will, nothing here paſſeth by the Will, but by the Feoffment. Flemming chief Iuſtice agreed with him herein, and in Sir Edward Cleres caſe, when a man makes a Feoffement to the uſe of his laſt Will, he himſelf hath the uſe in the meane time, and may limit eſtates, according to the power reſerved to him upon the Feoffement, and upon the limitation, the eſtates ſhall take effect by force of the feoffement, and the uſe is directed by the will, ſo that in ſuch a caſe, the Will is but only directorie. Williams Iuſtice, the iſſue here in this caſe is condidit teſtamentum necne, this is the direct iſſue to be tried, and not condidit teſtamentum, ou non—modo, & forma, for ſi condidit tunc declaravit. Si non condidit, non declaravit: the Jury found that he made the Will.

A Coppyholder ſurrenders to the uſe of his will

Sir Edward Cleres caſe.

## *Browning* Plaintif againſt *Fuller* Defendant.

IN a Writ of Error to reverſe a Judgement given in an Action of debt, brought by an Executor, as Executor, the error aſſigned was, for the omiſſion of this clauſe in the end of his declaration. (s.) Et profert hic in curiam literas teſtamentarias, whether this omiſſion was error or not, was the only queſtion, for the determining of which, it was queſtioned, whether this clauſe, be matter of ſubſtance, or but only matter of forme. Williams Juſtice, cleerely this is matter of Subſtance, and ſo was it adjudged in one Sir John Savadges caſe, that this clauſe was matter of ſubſtance, for the omiſſion of which, in an Action of debt brought by an Executor, and a Writ of error brought to reverſe the Judgement, this was the only error aſſigned, and for this error, the Judgement was held erroneous by the Court, and reverſed, and ſo in this principall caſe here, by the opinion of the whole Court, this is very cleere and apparant error, and for this error, by the Rule of the Court the judgement was reverſed.

A Writ of error to reverſe a judgement, &c.

Sir John Savadges caſe.

Judgement reverſed per curiam.

*Deane*

## *Deane* Plaintif againſt *Eton* Defendant.

IN an Action upon the Caſe for ſcandalous words ſpoken by the Defendant of the Plaintiff, which words were theſe, (s.) That the Plaintiff had placed a woman in ſuch a ones houſe, to the intent for to poiſon her, with an averrement in the Declaration, that he had placed this woman in that houſe for to attend, and look unto an old Woman in the ſaid houſe not being well, : upon not guilty pleaded, a Verdict was given for the Plaintiff. It was moved in arreſt of judgement for the Defendant, that theſe words are not actionable, becauſe, that there is not here laid any Act to be done, but an intention to have an Act done, and that therefore this is no ſcandall. Williams Juſtice, the Action is here brought for the diſcredit and ſlaunder, he hath by reaſon of theſe words thus ſpoken of him, and not for any act done. Theſe words do tend very much to his diſcredit, he being high Sheriff at this time, and a great Officer, and out of his care, placed this woman in the ſame houſe, for to attend the old woman in that houſe, ſhe being aged, and not well, and therefore it may very ſtrongly be enforced, that theſe words do ſound very much to the ſlander and diſcredit of the Plaintif, and are well actionable, for that ex ſenſu verborum, conſtruction is for to be made, and to this purpoſe there was a caſe here adjudged in Mris Pasfields caſe, the words there were theſe, (s.) Mris Pasfield writ a letter to one for to poiſon her Husband, for which words, an Action upon the caſe was here brought, and judgement was given for the Plaintif, and the ſame judgement affirmed in a Writ of error in the Exchequer-chamber, and ſo here, as in that caſe, ex ſenſu verborum, without any act done, if the words in themſelves are malitious, and do tend to the diſcredit of the partie of whom they were ſpoken, as here they are in this caſe, and therefore by the opinion of the whole Court, theſe words are ſcandalous, and well actionable, and ſo by the Rule of the Court, Iudgement was given for the Plaintiff.

An action upon the caſe for words ſpoken by the Defendant of the Plaintiff.

Mrs Paſfields caſe.

Judgement given for the Plaintif.

Nota, that an exception was taken to an indictment upon the Statute of 8. H. 6. for a forcible entrie, the exception was, becauſe the entrie was into a Rood of Land, or into half a rood of Land, and for this incertaintie, it was moved, that indictment might be quaſhed. This was ruled by the whole Court, ( Williams Juſtice only excepted) to be a good exception. Williams Iuſtice, this indictment is cleerely good, and that he could ſhew a direct judgement in point for this. Man. Secundary informed the Court, that he could ſhew the contrary, in point of Judgement in the like caſe, in an ejectione firme, and the like exception taken in arreſt of Judgement, and ruled a good exception. In this caſe for this exception by the rule of the Court, the indictment was quaſhed for this incertainty.

Exceptions to an indictment upon the Stat. of 8. H. 6. &c.

Indictmet quaſhed, &c.

## *David Waterhouſe* his Habeas corpus.

NOta, that a Habeas corpus was granted by this Court to the Warden of the Fleet, for to have here in Court the body of David Waterhouſe, the ſame returnable at a day certain, at which day, the Warden of the fleet did refuſe to make his return, & to bring in the body; upon this Hen. Yelverton moved the Court to have a Rule entred againſt the Warden of the Fleet, and the ſame returnable at another day, to bring in the body upon a paine, upon this motion, the Rule of the Court was, that he ſhould return the body of David Waterhouſe the next day ſub pœna 20. l

A Habeas corpus ſub pœna to the Warden of the Fleet, &c.

and by the whole Court, ſo are all the Preſidents, be the partie impriſoned for Felony, or for Treaſon, the Officer under whoſe cuſtodie he is, ought for to obey the Writs of Habeas Corpus coming from this Court, and if the ſame was directed unto the Lieutenant of the Tower, all ſhould be one.

An exception taken againſt a witneſſe,&c.

NOta, by Flemming chief Juſtice and the whole Court, in a triall at the bar, where exception was taken againſt a Witneſſe, to prove the execution of a Deed of Feoffement by livery of Seiſin, where caſe the was, a Feoffement in Fee was made to the uſe of I. *S.* and two Witneſſes were ſubſcribed to prove the livery of Seiſin, afterwards one of theſe Witneſſes, has an eſtate at Will made unto him of part of this Land, and he being produced, to witneſſe the execution of the Feoffement by livery of Seiſin, was excepted againſt, becauſe he was now a partie intereſſed in part of the Land, and ſo his oath was to make his own eſtate good, but notwithſtanding this exception was diſallowed by the whole Court, and that he might well be ſworn as a lawfull Witneſſe, to prove the executing of a Feoffment by Livery and Seiſin, this being in affirmance of the Feoffement, and accordingly, by the Rule of the Court, he was ſworn, and his teſtimoney received and allowed of.

## *Dockley* Plaintif againſt *Bury* Defendant.

An action upon the caſe for a promiſe, &c.

IN an Action upon the Caſe, grounded upon a promiſe, the caſe appeared to be this, the Plaintiff having two parts in a Ship, which was going to France for Stones, he did grant unto the Defendant, the moitie of his gaine which he ſhould have in this voyage, and in conſideration of this, the Defendant did aſſume, and promiſe that he would be at the charge of the moitie of the loſſes, which the Plaintiff ſhould ſuſtaine in the ſame voyage, & did likewiſe aſſume and promiſe to pay ſo much as ſhould amount unto the moity of the Loſſes, upon requeſt which he hath not performed, and for this cauſe the Action was brought, the Plaintif in his Declaration averred, that his loſſe in this his voyage, amounted unto 40 l. and more, ſo that his part of the loſſes, as appeared upon account, amounted unto 22. l. 1. s. the which he had requeſted the Defendant for to pay him, which he refuſed to do, upon a Non aſſumpſit pleaded, a verdict found for the Plaintif. It was moved in arreſt of judgement for the Defendant, that the Declaration was not good, for the incertaintie of the conſideration, to raiſe the promiſe, for which incertaintie (that which was granted, being only a poſſibilitie, the which was altogether uncertain, and this is the conſideration, upon which the promiſe here was made, which conſideration is not good for this uncertaintie in it, and ſo the conſideration failing the promiſe is not good. Williams Juſtice, if there was at the beginning a poſſibilitie, and afterwards the ſame is reduced unto a certainty, this is cleerely a very good, and ſufficient conſideration for to raiſe a promiſe, and it could not be better. Yelverton Juſtice, what more certainty can there be in an adventure, none at all, this poſſibilitie, and uncertainty, is now by this his return, well reduced unto a certainty, and ſo the ſame is good, being now all made certaine by the account had, and made of the gain, and loſſe, being now by this all made certain. Yelverton and Williams Iuſtices, this is a common thing, and very uſuall for one to grant the benefit, or the moitie of the benefit which is to come to him, by ſuch a way or means, and this is good, and may be reſembled to the grant of a Parſon of his tithes, as appears in Perkins in his Chapter of Grants fo. 20. pla. 90. and ſo there, if one grant all the Wooll of his Sheep for years, this is good, and ſo by the opinion of the whole Court, in the principall caſe here, this is a good, and a ſufficient conſideration, and certainly ſufficient therein, and that the Declaration is good, and ſo by the Rule of the Court Iudgement was entred for the Plaintiff.

Judgement given for the Plaintiff per curiam.

The

## The *King* againſt *Springall.*

NOta, that exceptions were taken unto Springalls Indictment, the ſame being Quia exerit quondam januam, apud Horneſey in Com. Middleſex, in via regia, ducent. unto Higate, and doth not ſhew in what County Higate was, but nota, that in the margent, (Middleſex) was written. Hutton moved the Court, that notwithſtanding this be ſo, yet it doth not hereby appear to the Judges, as Judges, in what County Higate here was. The whole Court cleere of opinion, that the Countie being writ in the Margent, doth well and this, and ſo take off this exception, and that this word (Middleſex) writ in the Margent, ſhall well go unto Higate alſo, and ſo the Indictment is good by the opinion of the Court, but otherwiſe it had been, if in caſe of Felony by the whole Court.

Exception to an indictment, for erecting of a gate

Indictment good per curiam.

## The King againſt *Clarke.*

NOta, that exceptions were taken unto Clarks Indictment being for murder of, &c. The firſt Exception taken was this, that the aſſault and affray is therein expreſſed to be 12. Februarii at Oxford, and that he gave him a blow on the right ſide, in this manner expreſſed, (s.) dans eidem—unam plagam mortalem, & adtunc, & ibidem, without ſhewing of any time certaine, when this blow was given. Secondly, it is ſet forth in the indictment, that he being thus ſtruck, Languebat à duodecimo die Febr. uſq; 13. die Februarii, ſo that (a) doth exclude 12. die, and uſq; doth exclude 13. die, and ſo no day laid at all, 3.—quo quidem 13. die Febr. inter horas, quartam, & quintam obiit, this is laid inſufficiently, being an impoſſibilitie. Fourthly, and ſo the ſaid Robert Clarke prædicto 13. die Febr. did kill and murder him. Yelverton Iuſtice, there ought to be a perfect hour between them, being laid to be inter horas, &c. ejuſdem diei, this is not good. Williams Iuſtice, in caſe of Indictments, no ſuch exception is allowable by Law, as to the incertainty of the hour, otherwiſe it is in caſe of Appeals, by the Statute of Glouceſter 6. E. 1. cap. 9. ſo that this exception here, as to the hour, is of no force, but here in this Indictment there is no place laid where the ſtroke was given, and for this omiſſion here, the indictment is not good, for the place where the ſtroake was given, ought to be certainly laid, and ſo is Longs caſe, Coke 5. pa. fo. 120, 121. that the place where the ſtroake was given ought to be certainly laid, for he may aſſault him at one place, and give the ſtroake to him at another place, as in Lacyes caſe, Coke 2. pa. fo. 93. put in Binghams caſe. Croke Iuſtice, as to the point of time, theſe words, adtunc, & ibidem refers to all the whole ſentence, as to words (inter horas) by theſe words, there is a diſtinction of time denoted, as time paſt, and time to come here it is ſaid. That he killed him the 13. day, which cannot be, as it is laid, ſo that this is a fault incurable. Williams Iuſtice and the whole Court agreed with him in this, that the indirtment is not good, but he ought to have ſaid in the concluſion (s.) and ſo he killed him, modo & forma prout. The Court held the Indictment inſufficient for thoſe exceptions, and therefore by the Rule of the whole Court the indictment was quaſhed.

Exception taken for to quaſh Clarks indictment of murder.

Longs caſe.

Indictment quaſhed per curiam.

Nota, exceptions taken for to quaſh an indictment of murder. The 1. exception was taken, à ſeſſione juſticiar. and doth not ſhew what Seſſions this was, and this being omitted, is not certain to the Court, whether they had any Authority or not. 2. The fact is laid to be in this manner, that 2. Jac. and ſuch a day he did aſſault the partie with a ſword, and give unto him unam plagam mortalem, but ſhews no place where this aſſault was made. William Juſtice, this Indictment is not good, becauſe there is no place mentioned where the ſtroake and wound was given.

Exceptions to an indictment of murder.

It it alſo expreſſed in the indictment, that Eo ictu inſtanter obiit, this is uncertain, and ſo the indictment not good. It is alſo laid in the indictment quod cum quodam gladio percuſſit, but neither time, nor place, of this is ſpecified, and ſo not good, alſo it is expreſſed, that eo ictu dedit, to the partie killed, unam plagam mortalem, and no place expreſſed where this was, neither the length, nor yet the breadth of the wound ſet down, and ſo the indictment not good, the whole Court was cleere of opinion, that for theſe exceptions, the indictment was not good, and that therefore by the Rule of the Court the indictment was quaſhed, and the partie diſcharged of this, but by the Rule of the Court, the Kings Atturney Generall ought to ſee ſuch indictments, and to be made acquainted with them, that ſo ſuch groſſe miſtakes may not be for the future.

Judgement quaſhed by the rule of the Court.

Note where a Bar is to be amended, &c.

Nota, by Yelverton Iuſtice, and agreed by the whole Court, and a Rule entred by directions of the Court to be duly obſerved by all for the future, that in all legall proceedings here, if in pleading, the Bar, and Replication be both of them bad, and to be amended, here in ſuch a caſe, both of them ſhall be amended without any coſts at all to be paid, the Plaintiff and Defendant being both of them in this caſe, in the like degree faulty, but if the Barre be only bad, and the Replication good, in this and the like caſes, the Bar is to be amended, but here coſts are to be paid to the Plaintiff.

Prohibition quia, grounded his libell for tithe wool &c.

Nota, in a Prohibition prayed upon a Libell in the Spirituall Court for Tithe Wool, the ſuggeſtion was, that he in his Libell ſets forth, that he ought for to have the tenth, and this pretended to be by a cuſtome, by which he is to have the ſame, without the view or election of the partie, upon this ſuggeſtion, a prohibition granted, and the ſame grounded upon this cuſtome, and Declaring in the Prohibition, the other demurs in Law, and ſtrikes out this part of the cuſtome alledged, (that he was to have the tenth (without the view or election of the partie, (and this by him ſo done before the demurrer entred) and ſo prayes a conſultation. The Court in this Caſe granted a Conſultation, as to the Tithe to proceed there, but for to proceed at the Common Law, as to the cuſtome, and that without any amendment, the ſame is to be, as it was laid before, for that he cannot ſtrike out or alter any thing, or any part of it, after the Demurrer, and in this the whole Court agreed.

No amendment or alteration after a demurrer.

## *Collins* Plaintif againſt *Goldſmith* Defendant.

Debt for rent behind, the Defendant pleads an entrie, &c.

IN an Action of debt for rent behind, reſerved upon a leaſe for yeares, the caſe appeared to be this. A man makes a leaſe for years, rendring a yearly rent, the ſame payable at two Feaſts in the year, (s.) at our Lady day, and Michaelmas, and if it be behind in part, or in all, by the ſpace of ſix dayes after any Feaſt of payment, that then it ſhall be lawfull for the Leſſor to enter, the Leſſor brings an action of Debt for Michaelmas rent behind. The Defendant being the Leſſee, pleads in Bar, and ſhewes, that for rent due, and behind at Lady day, before the Plaintiff his Leſſor had entred upon him, and out of the poſſeſſion, expulit & amovit, the Defendant his Leſſee, and ſo: as it was urged by Hen. Yelverton for the Defendant by this his entrie, he hath ſuſpended his rent, and the Plaintiff hath not ſhewed any new re-entry by the Defendant his Leſſee (as he ought to do) and this to be before Michaelmas, for to revive his rent. Williams Juſtice, there is no neceſſitie for the Plaintiff to do this, for he may enter before Michaelmas and revive his rent, and when he hath here brought his Action of Debt for his rent, as in this caſe

the

the Leſſee ought for to ſhew this his entrie, and by this his entrie, a ſuſpenſion of his rent, and he ought alſo to conclude and ſay, that of this he did continue ſtill the poſſeſſion, and ſo was in poſſeſſion at the time of his action brought, but he having not ſhewed this, the Plaintiff hath juſt cauſe to recover his rent behind, and for the recovery of which, the Action of Debt is here well brought. Yelverton Iuſtice held the contrary, for that here the Leſſor himſelf being Plaintiff for his rent, and an entrie made by him, and ſo thereby a ſuſpenſion of his rent, being by way of plea alledged againſt him, he ought to ſhew the re-entring of the Leſſee before Mich. and this ought not for to come on the part of the Leſſee himſelf, to ſhew his recontinuance of the poſſeſſion, but it is ſufficient for him to plead in Bar, the firſt entrie of the Leſſor to make a ſuſpenſion of his Rent, the which poſſeſſion in judgement of Law, ſhall be taken, ſtill to have continuance, unleſſe that the Leſſor himſelf (being Plaintiff in the action of his rent) do ſhew the contrary by his alledging that the Leſſee had re-entred again, and ſo by this had regained the poſſeſſion, and this the Plaintiff ought for to ſhew, and ſet forth himſelf, thereby to revive his rent, and ſo to enable him to bring his Action for the recovery thereof. Croke Iuſtice agreed with Yelverton Iuſtice herein, for that his rent being once by his own entrie ſuſpended, the ſame cannot be derived again without the re-entrie of the Leſſee himſelf, and this ought cleerely ſo to be ſhewed by the Leſſor himſelf, thereby to enable him to have this his Action of Debt, for recovery of his rent, but without this his ſo doing, he cannot have it, and he not having ſo done, cannot be intitled, to have, and maintain this action of Debt here for his rent, and ſo the Action by him is not well brought, nor can be maintained, and ſo the Court being divided, two againſt one for the Defendant, and againſt the Plaintiff, but the Court not being full, judgement was not now given, though the better opinion was cleerely againſt the Plaintiff. This was afterwards ended between the parties, perceiving the opinion of the Court, and was not moved again.

A Leſſor enters by force of a condition for non-payment of rent, and after brings an action of debt for a ſubſequent rent without ſhewing of any re-entry made by the Leſſee to revive his rent, by the better opinion of the Court it lyeth not.

Nota, by Williams Iuſtice, to which the whole Court did agree, that after the darraine continuance, this plea was pleaded, Actio non, and ſets forth for cauſe, for that he had releaſed unto the Defendant, all Actions, and demands. Curia cleerely, this is a good plea.

A plea of a releas after the darraine continuance is good, &c.

Nota, that an exception was taken to quaſh an indictment for a Reſcous, becauſe the ſame was not laid for to be Vi & armis, by the Rule of the Court, for this omiſſion the Indictment was quaſhed, and by the Court, A Capias, and an Exigent lieth in this Writ.

An indictment quaſhed for want of vi & armis.

Nota, that uſage was pleaded for to have a Capias for the firſt Proceſſe, the ſame being contrary to the Rules of the Common Law, and contrary to the courſe of this Court, and to the Statutes in this caſe made, and provided, by the Rule of the whole Court, this uſage is not good, nor to be followed.

Nota, touching uſages for proces.

Nota, that an exception was taken for to quaſh an indictment, taken upon a preſentment for a Nuſans, the exception was this, in the indictment, the ſame was laid for to be, in via regia, but it is not laid where this place is, nor yet in what Countie: the indictment therefore ruled by the whole Court not to be good, and the partie, by the rule of the Court diſcharged.

Exceptions taken to an endictment,

*Butts*

## *Butts* Plaintiff againſt *Jennings* Defendant.

A Writ of error brought by the plaintif an infant, &c.

IN a Writ of Error for to reverſe a judgement given in the Court of C. B. in an action of Debt there brought againſt the now Plaintiff, and a Judgement there given againſt him: for to reverſe which judgement, a Writ of error is brought, and for error aſſigned, it was ſhewed, that at the time of the Judgement given againſt him, and that he is ſtill within age, and this is laid to be ad grave damnum ipſius, &c. and upon this, the Court did inſpect him, and upon the Inſpection, he appeared to the Court, to be within age. Williams Juſtice demanded how he came here, for to be inſpected by the Court. Mann. Secundary made anſwer, that he hath brought a Writ of Error for to reverſe this judgement given againſt him, and aſſigns this for Error, that he was, and is ſtill within age, and ſo by this means, he comes hither to be inſpected by the Court. Williams Iuſtice, in a Writ of error brought by an Infant for to reverſe a fine by him levied for infancy, here in this caſe, he is to be inſpected by the Court, but it is very doubtfull, whether in this caſe, of a Writ of Error by him brought, for to reverſe a judgement given againſt him in an Action of Debt, he ſhall be inſpected by the Court, or not. Mann. Secundary made anſwer, that this is a uſuall courſe for him in ſuch a caſe, to come into the Court in this manner, by his writ of error for to be inſpected, and a Scire facias is to iſſue againſt the others, for to come in. Flemming chief Iuſtice, and Yelverton Iuſtice, cleerely we may well inſpect him, when he comes in by Writ of error, and by the opinion of the Court, if he be of full age, the other ſide ought for to averre this, and day was given by the Court, to the other ſide for to ſhew cauſe, or elſe for this error the Judgement to be reverſed, and no cauſe being ſhewed, by the Judgement of the Court, judgement was reverſed.

Judgement reverſed per curiam.

A writ of error to reverſe a fine, &c.

Nota, that a Writ of error was brought for to reverſe a fine levied for want of a Proclamation, the Caſe was this. A fine being levied with Proclamations according to the Statute of 4 H. 7. cap. 24. the error aſſigned for to reverſe this fine, was, for that no Proclamation was made the firſt day. The whole Court was of opinion, that this was an error apparant, for to reverſe the Proclamations, but the Fine ſtill remaines as a good fine at the common Law, and ſo for this error, the Rule of the Court was to reverſe the fine, as to the Proclamations only, but the ſame ſtill to remaine as to the fine, for to be, and remaine ſtill as a good fine at the Common Law.

A fine reverſed as to the Proclamations, &c.

## *Atkins* Plaintiff againſt *Wheeler* Defendant.

In a Trover and converſion, the place only where the goods came to the Defend. &c.

NOta, that in an Action upon the Caſe upon a Trover and Converſion of certain goods, by the opinion of the whole Court cleerely, no other place is to be expreſſed in the Declaration, but only the place, where the goods came unto the hands of the Defendant.

In conſideration of forbearance, per breve tempus &c.

Nota, That in an Acion upon the Caſe, grounded upon a promiſe. Croke Iuſtice, if in caſe of an Obligation, a man is bound for to pay unto the Obligee ſuch a ſumme of money, infra breve tempus, after the ſealing and delivering of the Bond

Bond, by construction of Law, this shall now be paid within some convenient time after, upon request made. The principall case here was, that in consideration, that he would forbear him, per breve tempus, he did assume and promise for to pay him, infra breve tempus after Easter. The Court was cleere of opinion, that this breve tempus here in this case, by construction of Law, shall be said, and construed to be presently for to be paid in time convenient, that is, he shall be presently paid upon such a promise, and this to be so by the Rule of the whole Court.

## *Mosse* Plaintif against *Townsend* Defendant.

NOta, that if a man do leave his Horse in an Inne in London, and there he eats up in Hay, and Provender more then he is worth, In such a case the Court was informed, that the custome of London was this, that the Horse should be praised by the Innekeepers next neighbour, and afterwards to be sold for payment of the money there owing for him, the Court was cleer of opinion, that this was a good custome, as the same was alledged. Mountague Sergeant & Recorder of London, the custome of London as to the Innekeepers is this (s.) If one brings a Horse to an Inne, leaves him there, and goes his way, and the Horse eats up more then his price, by the custome of London, the Innekeeper may sell this Horse to pay himself, (but not if the Debt was for other Horses) as if one do bring many Horses into an Inne, and afterwards takes all of them away but one, the Innekeeper cannot sell this one Horse, for payment of that which was due to him for the other Horses, by the custome of London, notwithstanding the Debt doth amount to more then the price of this Horse, but every Horse is to be sold by the custome, to satisfie the Debt due for his own meat only. In this principall case, Sir Robert Townsend went beyond sea, and this was his horse.

Note the custome in London to have a horse praised and sold to pay for his meat, &c.

## *Cox* Plaintiffe, against *Gray* Defendant, entred Hill. 5. Jac. B. R. Rot. 876.

Hall. v Stanley. Mich. 10. Jac. 10 rep. 68. b.

IN a Writ of Error for to reverse a Judgement given against him in the Court of the Marshallsee, in an Action of Trespasse upon the case, for a Trover and conversion of certain goods, and upon Not guilty there pleaded, a Verdict and judgement was given for Gray against Cox, and for the reversing of this Judgement, a Writ of Error was brought by Cox, who died, hanging this Writ of Error, and afterwards error was assigned in the said judgement, on the behalf of Mary Cox, the Wife and Executrix of Cox, against whom the Judgement was given, and the Error assigned was this, that in the first Action, none of the parties at the same time were of the Household of the King, and so for this cause, the Court of the Marshallsee had no jurisdiction of the cause, and so all their proceedings in this cause, and the judgement there given was coram non judice, and so erroneous, and to be reversed. Croke Justice, this is a good error, and for this error the Judgement is erroneous, and ought to be reversed. In this case, neither for the Action, nor yet for the persons, the Court of Marshallsee had any jurisdiction, and more especially in regard of the persons. As to the dignity of this Court, it is to be agreed, that the same is of as great antiquitie as any Court, as appeared by L. 5. E. 4. fo. 129. where it is said that the Marshallsie was, and is one of the Antientest Courts within this Realm. This Court, sequitur personam Regis, and by Britton, it is Curia Regis, & Hospitia Regis, and Fleta, this Court follows the person of the

A Writ of error to reverse a judgement, &c. The case of the Marshallsie.

the King, be he within the Realm, or out of the ſame, for there the King being in France, in alieno Regno, he, notwithſtanding did there do juſtice upon an offender within the verge, ſo that this Court is of a very high dignitie, but yet not for to be compared with this Court of the K. Bench: the difference between them, the one of them as before, ſequitur perſonam Regis, but otherwiſe it is of the K. Bench which is in perſona regis & coram juſticiariis domini regis, & this coram domino rege, & coram ipſo rege upon the Stat. of Articuli ſuper chartas cap. 3. mention there made of things done, (inter gens de hoſtle le roy) this refers to the Marſhalſie (et inter gens de people) this refers to the Kings Bench) and ſo the difference, &c. The ſecond difference in the Statute is this, the Marſhalſie is a peculiar and a private libertie, the Kings Bench is a Court for the Common Law, and for generall matters. Alſo the Court of Marſhalſie is a Court, like unto a ſmale River, flowing from the Common Law, as from the fountain, and here they ſeem for to follow, rivolas, when as they ought petere fontes. As touching the expoſition of this Statute of Articuli ſuper chartas cap. 3. touching the Juriſdiction of the Court of the Marſhalſie, it appears by this Statut, the place, caſes, and perſons were before the ſtatute, this Statute was made ad emendationes ſtatus populi, &c. quod de cætero ordinatum eſt. Fourthly, mention is made in this Statute, that they ſhall not hold plea, but only of treſpaſſe, as in the Statute, the place, perſons, and actions are there reſtrained, &c. and this for to ſhew the abuſe that was before. Fifthly, their encroachment is ſhewed, and for this it appears by 6. R. 2. Brooke tit. Action upon the Statute placito 49. in Debt, ſur Recovery de dammages, before the Marſhall in an Action of Covenant, and it is a good plea, to ſay that none of the parties were at that time of the hoſtle of the King, and ſo the proceedings there coram non judice, and with this agrees 19. E. 4. fo. 8. b. in 20. E. 4. fo. 16. an Action was ſued in the Court of the Marſhalſie by one of the hoſtle le roy, againſt a ſtranger, and recovered againſt him, the ſtranger afterwards brought a Writ of error, and aſſigned this for error, that he was a ſtranger who was there ſued, and this was there held to be a good error, for that the Marſhalſie had no power to hold any plea, but there only, where both the parties were of the houſhold of the King, and it is there ſaid, that it is in the election of the partie, either to have his writ of error, and ſo to reverſe the judgement, or elſe for to avoid the ſame by plea, which he may well do, and ſo is 22. E. 4. fo. 31. b. that a judgement given in a Court, which hath no juriſdiction, may be avoided by the partie, againſt whom the judgement was given, and that by way of plea, for that this is coram non judice, as in the Court of Marſhalſie, unleſſe that both the parties ſont del hoſtle le roy, and to this purpoſe ſee Fitz. Nat. Bra. fo. 241, 242. the Writ brought upon this Statute of Articuli ſuper chartas cap. 3. many preſidents there are in this kind for to warrant this. So is Michelborns caſe, Coke 6. a. pa. fo. 20, & 21. and the caſe between Read and Purchaſe, which was Mich. 32. H. 6. Rott. 27. there cited in a Writ of error, and no other error aſſigned, but only this, that none of the parties were del hoſtel le roy, and for this error the Judgement reverſed. Michelborns caſe is terminis terminantibus, this very caſe, the ſame caſe, the ſame action, and the ſame error aſſigned, and reſolved to be reverſed, but the reverſall not entred on the Record. An Action of Treſpaſſe contra pacem, is uſually to be determined there, but not other treſpaſſes, as againſt a Smith for pricking of a horſe, and ſo both for the plea, the perſon, and the thing, this caſe here now in queſtion, was not within their juriſdiction, neither de debito, ne denter choſe, ſo is the Statute. An ejectione firme is not determinable there, and yet this is ſub modo, a treſpas, and ſo this judgement here for the error aſſigned is erroneous, and ought to be reverſed. Williams Iuſtice of the ſame opinion, that the judgement here is erroneous, and ſo to be reverſed. As touching the Antiquity of this Court, it is by preſcription, and ſo it ought to be antient, and this ſeems for to be grounded upon reaſon, that the King ought not for to be without means, and laws to govern his ſervants by, within his houſehold, and this for their better attendance on him, before this Statute of 28. E. 1. Articuli ſuper chartas cap. 3. it was doubtfull how far the compaſſe of the Verge ought for to be: they are not to hold plea, if the

The difference between the Court of the Marſhalſie and the Kings Bench.

6. R. 2. d. Brook tit. action upon the ſtat. pla. 49.

Coke 6. pa. fo. 21. in Michelborns caſe, Reads and Purchaſe caſe there cited.

Stat. 28. E. 1. Articuli ſuper chartas cap. 3.

they have not Cogniſance, and in what place the extent of this to be, and in what caſes they are to hold Plea it appears by the Book of 4. H. 6. fo. 8. that ſuch power, and authoritie, is not given to them, as to other Courts of Record, the Caſe there was an action of Treſpaſs was there brought againſt one, retornable at a day, and as the Defendant was comming for to anſwer, the Plantiff he was arreſted into the Court of the Marſhalſey, and upon the prayer of the partie, a habeas Corpus was granted to the *Marſhal*, for to have the body in Court, and the Court dio diſcharge him of the execution, for by the Court there, this Court is inferiour to all other Courts, as the Kings Bench, Common Pleas, and the Exchequer. Three things are neceſſarily to be intended, as to the true conſtruction of all Statuts. First, the miſchief, that was before the making of it, Secondly, the true intent of the makers, in making of the Statute, and thirdly the ſcope, and purview of the Statute it ſelf. Now as to this Statute of Articuli ſuper chartas chp. 3. upon the words of which Statute an argument may be grounded, as to the words of the Statute, the ſame begins, concerning the eſtates, and authoritie of Stewards, and Marſhals, and of ſuch Pleas, as they may hold, and in what manner, and how they are to hold, no plea of freehold, debt, Covenant, nor contract, made between the Kings people, but only of Treſpaſs, done within the Kings houſe, (there the ſtop is to be made,) and not at the other clauſe (s.) et nul plea de Treſpas &c.) and where their bounds are not determined, this is then left unto the Common Law. The beſt expoſition of this Statute is, for to take all the Statute into conſideration. First, the firſt thing to be conſidered here is, the great miſchief, that was before the making of this Statute, for they would there hold plea, of any matter, and to the very great oppreſſion of the Kings people, by the Statute of 13. R. 2. capite 3. their juriſdiction is limited, and the Statute of 15. H. 6. cap. 1. gives an averment to the partie, being named by the Marſhal, to be of the houſhold where he was not, to ſay, that he is not of the houſhold. As to the authorities in point, it appears by 38. E. 3. fo. 7. that at the Common Law, a man may contain many treſpaſſes in one writ, but otherwiſe it is in an action upon the caſe, as to the caſe of 38. E. 3. fo. 18. objected at the bar, this is not to any purpoſe at all, for it is not there confeſſed, nor allowed, that any of the parties, were of the houſhold of the King, but he would have it intended, that one of the parties was of the Kings houſhold, here are three remedies given againſt them, if they exceed their limits. First, an action of treſpas. Secondly, an action upon the caſe upon the Statute of Articuli ſuper chartas, and thirdly, a writ of error, and ſo is 19. E. 4 fo. 8. 6. R. 2. Brook tit. action upon the Statute placito 49. 7. H. 6. fo. 30. et 31. 10. H. 6. fo. 13. et 22. E. 4. fo. 31. and according to this are the Statutes before remembred, ſo that the Law in this is very clear and plain. But this Court is like unto a Hydra's head, that never will be quiet, Placita aulæ hoſpitiæ, domini Regis tenentur in ſuch a place certain, this was their ſtile formerly, but now they have altered the ſame, and made the ſame coram ſuch a one Marſhal, before the Statute of Articuli ſuper chartas cap. 3. their limits were not known. As to the objection made of the Citizens of London, this was only to gain to themſelves, freedome, and immunitie, from the juriſdiction of the Marſhalſey, as before they had &c. but this was not to make a new Law. And as to the Statutes of 5. E. 3. cap. 2. and of 10. E. 3. cap. 2. this was for to give a writ of error, but by the Common Law, he might have a writ of error, and ſo is---21. H. 7. fo. 13. a writ of error lies here at the Common Law, and the Statute explaines the Common Law. As to the preſidents 29. H. 6. Rot 21. between White and Barton here ruled in this Court, to be erroneous and reverſed, in which caſe one of them was of London, and the other of Southwark in treſpaſs, the ſtile, in aula hoſpitii Mich. 32. H. 6 Rot. 27 in Read and Purchaſes caſe, accordingly Mich. 1. E. 4. Rot. 47. in Treſpaſs, by two judgements given, a writ of error brought, error aſſigned that none of them were of the Kings houſhold, and for this error reverſed. The Regiſter fo. 17. which is a Book of very good authority

Three things are requiſite to the true conſtruction of all Statutes

Statute of Articuli ſuper chartas cap. 3.

Regiſter fo. 17.

The old Book of Entries tit. Error upon a judgement given in the Marſhalſie fo. 296. b. erroꝛ aſſigned that no partie was of the hoſtel de roy, and the preſident of Mich. 1. E. 4. Rot. 47. is remembꝛed. Fitz. Nat. Bre. fo. 241. 242. & fo. 246. F. which Book was wꝛit by him when he was a Judge) and ſo any matter determined in the Marſhalſie, where none of the parties are of the Kings Houſhold, this is erroꝛ clerely, 1. E. 6 in treſpaſſe, foꝛ a Treſpaſs done in vita teſtatoris in the Marſhalſie, a Wꝛit of Erroꝛ bꝛought here, there they altered their ſtile, Coke 6 pa. fo. 12. in Jentlemans caſe, where it is ſaid, that in the Court of Marſhalſie, the Steward & Marſhall del hoſtel le roy are Judges, & if they meddle where they have no power, this is erroꝛ, and the pꝛoceedings there are coram non judice, Coke 6. 20, 21. in Michelborns caſe, this was there agreed foꝛ to be a good erroꝛ, but the Judgement was not entred, becauſe that one of the parties died before. But Fenner Juſtice infoꝛmed him, that in that caſe, that three of them were agreed, that the Judgement was erroneous, and ought to be reverſed. Now as touching actions of Treſpaſſe, ſome of them are vi & armis, and ſome without it, Treſpaſſe by a Tenant againſt his Loꝛd not vi & armis, by 9. H. 6. fo. 30. An action upon the Stat. of 5. R. 2. cap. 7. forcible entrie, not vi & armis. Nuſans is a Treſpas, but not vi & armis. As to pꝛeſidents of their Court, that they uſe the contrary, if they have there millions of pꝛeſidents, no account is to be had of them, foꝛ that they ought to be ruled in their pꝛoceedings there, by the Rules of the Common law, and their uſages there, in their inferiour Courts, ſhall not bind theſe our higher Courts, being the generall Courts foꝛ doing of Juſtice, as appears by L. 5. E. 4. and that throughout the whole Realm the Court of Marſhalſie is a bounded Court, and the limits to extend, but within the pꝛecinct of twelve miles, and as to their pꝛeſidents the Law will rule them, becauſe an inferiour Court, but otherwiſe it is, of the pꝛeſidents of a ſuperiour Court, they ſhall binde an inferiour, but not è converſo, and ſo concluded, that be this a treſpas ſur trover, et converſion vi, et armis, or not, and this is erroꝛ, and foꝛ this erroꝛ the judgement ought to be reverſed, and did adviſe them not to ſwell, foꝛ if they did, this Court would then ſoon pull them down, and keep them within their bounds——Yelverton Juſtice, the judgement is erroneous, and to be reverſed, they have no authoritie there to hold Plea of this. This caſe doth reſt upon the Statute of 28. E. 1. Articuli ſuper chartas cap. 3. by which their authoritie, actions, and perſons, are limited, the Statute of 13. R. 2. cap. 3. limits the place, this is a very antient Court as appears by L. 5. E. 4. the reaſon of this juriſdiction, is as well, foꝛ the eaſe of the houſhold, as foꝛ the ſervice of the King otherwiſe, they ſhould be dꝛawn to the Courts of the Common Law, and ſo the King ſhould be unpꝛovided foꝛ of his ſervice, by the Statute of Articuli ſuper chartas cap. 3. they are not to hold Plea, of freehold debt, covenant, noꝛ contract, but of treſpaſs—del hoſtel &c. and of other treſpaſſes, done within the verge, ſo that the Parliament doth here limit all their power, and makes the ſame certain, perceiving how they had exceeded their authoritie, extending the ſame to all perſons in general, and they have uſed to enter, that one of the parties was of the houſhold of the King, although in truth it was not ſo, and therefoꝛe foꝛ to meet with this was the Statute of 15. H. 6. cap. 1. ſo it which was not remedyed befoꝛe, by which Statute it is pꝛovided, that the partie ſhall not be eſtopped, from averring of this, and that this is a good, and a clear erroꝛ appears by many authorities, as by 20. E. 4. fo. 16. 22. E. 4. fo. 31. and 4. H. 6. fo. 8. and as to juriſdictions, the higheſt Courts have their limits, foꝛ we here in this Court, cannot meddle with Foꝛmedons, neither can the Judges in the Court of C. B. meddle with appeals——Brook tit. action upon the Statute placito 38. out of the diverſitie of Courts, where it is ſaid, that the *Marſhalſey* ſhall not hold pleas of contract, unleſs that both parties be del hoſtel le roy, and if they do hold plea otherwiſe, the Defendant may plead this, to the juriſdiction of the Court, alſo they are not foꝛ to hold plea there of matter of freehold, noꝛ of Treſpaſs, but only of Treſpas done within the Kings houſhold, and of other Treſpaſſes, within the verge, and of contracts

Coke 6. pa. fo: 12. Jentlemans caſe.

Coke 6. pa: fo 20, 21. Michelborns caſe.

The Court of Marſhalſie a bounded Court.

3.

Book title Action upon the Statute pla: 38.

Contracts and Covenants, which any one of the houſhold, doth to another of the houſhold, and within the ſame, and not otherwiſe, and if a treſpaſſe be done there within the verge, of this an Action lieth between whomſoever the ſame is, though they be not of the Houſhold, but contrary it is in caſe of Debt, and Covenant, 6. R. 2. Brook action upon the ſtat. pla. 49 where it is held a good plea, and coram non judice, where none of the parties are of the houſhold, 10 H. 6. fo. 13. there the Juſtices did view the Stat. and there it is held, that in an Action of Treſpaſſe, for Treſpaſſe done within the Verge, one of the parties ought to be of the houſehold. Old Book of Entries title Marſhalſie fo. 432, 433. a Prohibition upon a ſuit there in an Action of Debt, and neither partie of the Houſhold. It hath been ſaid, that Fitzherbert in his Book had miſtaken the Stat. this ſpeech might very well have been ſpared, he being a learned and a Reverend Judge, he puts the caſe of Treſpaſſe, eſpecially by way of inſtance, and that the only way to be quit from ſuit, is to bring an Action upon the Stat. of 28. E. 1. and to have a prohibition, where they proceed there, contrary to the Law, and ſo upon the whole matter, he held the Judgement there given to be erroneous, and ſo the ſame ought to be reverſed. Flemming chief Juſtice, notwithſtanding my opinion be the ſame one way or the other, yet the Judgement ought for to be reverſed, as to the true Judgement of this caſe, it is firſt here to be conſidered, for what cauſe this Judgement there given is erroneous. As to the queſtion made concerning the Juriſdiction of this Court of the Marſhalſie, theſe things are conſiderable. Firſt, of what nature this is. Secondly, the Antiquity of this Court. Thirdly, their limits. Fourthly, between what perſons they are to hold plea. Fifthly, with whom. And ſixthly, in what actions. It is very true (as it hath been well obſerved) that the greateſt Courts have their ſeverall Juriſdictions, and limits, for the King is fons juſtitiæ, & jurisdictionis, and as to juriſdiction, and diverſitie of Courts, which are greater, and which inferiour, ſee for this in the Book called the diverſitie of Courts. Now as to this Court of the Marſhalſie. Firſt, as touching the creation of it. Secondly, the juriſdiction of it before the Statute. Thirdly, the interpretation of the Statute of Articuli ſuper chartas cap. 3. touching their Juriſdiction. Fourthly, to conſider of the Book Authority, in affirmance of this, and all this is to be conſidered for the true conſtruction of this caſe. Firſt, as to the antiquity of this Court, whereas it hath been ſaid, that this hath been a Court time out of mind, and this is very cleere. But that this is a Court by preſcription, as it hath been ſaid) this cannot be agreed unto, for that every preſcription implies a grant, but this Court was not by grant inſtituted, but of common right, as all other Courts of Juſtice are, and this pro neceſſitate, and for this the definition of the Civilians, de juriſdictione, is to be agreed, & the ſame is thus defined to be (s.) Jurisdict. eſt poteſtas jurisdicendi, in publico introduct. pro neceſſitate, ſo the court of the C. B. & B. R. not by preſcription nor patent, have they their commencement, but de communi jure of common right, and ſo of the Court of the Marſhalſie, for as long as there is a King, ſo long of abſolute neceſſitie, there ought for to be a Court of Marſhalſie, for it is very neceſſary for the King, to be alwaies attended by his Servants, and if they ſhall be drawn by ſuits into other Courts, the King then ſhall looſe his ſervice, during the time that they are to follow their ſuits another reaſon may be upon the caſe of L. 5. E. 4. fo. 129. in the caſe of the Parſon of Dover, a very notable caſe, upon which caſe every one may well judge of the nature and juriſdiction of this Court, and of the commencement of it, & this ſhall ſuffice for the antiquity of this court. As to that which hath been ſaid, that this Stat. of Articuli ſuper chartas, &c. was made in emendatione, &c. as to this, this Stat. hath left their Jurisdiction, incertius, quam antea more uncertain, then before, the which Statute is ſo doubtfully penned, as that the Books do very much differ in the reciting of it, and in this they are faulty, this Statute is as a Labyrinth within this Kingdom, there are many companies, and ſocieties, and therefore the Law creates a Court for every juriſdiction, and this appears to be ſo, in L. 5. E 4 the caſe of the Caſtle of Dover, their Court not being by grant, nor preſcription, but for the people,

Old Book of Entries tit. Marſhalſie fo. 432. 433. prohibition.

4.

The diverſitie of Courts.

1.

L. 5. E. 4. fo. 129. the Parſon of Dovers caſe.

who in time of war ought to have jurisdiction for to govern them by, & to do them Justice. And so is the Court of Marshalsie, for in times past, as the Marshalsie is now, so was the Court of Kings Bench and C. B. they did attend the Person of the King, then comes the sta. which ordains that Communia placita, non sequantur curiam, nostram, sed in loco certo, &c. but yet the Court of B. R. although the same now be in loco certo, yet this court is itinerant, if the King so command, and this Court may put down all Commissions of Oier and terminer, but not the jurisdiction of the Court of Marshalsie, and this was the cause, that no Writ of error at the Common Law, did lie here for to reverse a Judgement, given in the Court of Marshalsie, untill that this was given by the Statute of 5. E. 3. cap. 2. but at the common law, a Writ of error lieth here for to reverse judgments given in all other Courts, as in the Realm of Ireland, & at Callice, but not to reverse a judgment given in the Marshalsie, because that the same Court, had no Court above it, & therefore this Writ of error was given by Parliament 5. E. 3 cap. 2. The Court of Marshalsie follows the person of the King, but this Court of the Kings bench, represents the Person of the King. The Title of the Court of Marshalsie is Aula hospitii domini Regis, and not infra virgam, and Fleta hath been well remembred, who hath put a case in his Book, where the King being in France, one did steale a Jewell from one of his company, and it was there questioned between the two Kings, whether this matter should be tried in the Court of France, or in the Court of Marshalsie of the King of England, and it was there ruled, the triall to be in the Court of Marshalsie, and so it was, for that this Court follows the person of the King: ubicunq; as if the King grants to one a Faire, there presently, as incident thereunto, ariseth a market Court, (s.) Curia pedis pulverisati, a Court of Pypowders, so called for the speedy dispatch of matters, and differences there arising, (even while the dust is, as it were on their feet) this being as much as to say, presently, & is unto a Manor, a Court Baron is incident, and for the redresse of criminall causes, the Law hath erected the Sheriffs turn, and the Hundred Court, and all these for the execution of Justice: and in all Countries, Justice is brought home, even to their very doores, as the severall circuits of the Judges, and this use was first instituted, for the better and speedier execution of Justice, the which is very commendable, and upon this ground was the creation of the Court of Marshalsie, and that so long, as there hath been a King, and this Court to be held, in aula Regis, and this being so, it is very cleere, and cannot be denyed. That there is no jurisdiction, be it of Place, Persons, or Actions, but they will cover still to adde more and more to their liberties, by way of incroachment, even as a River will weare down the Banks in time, and so be enlarged. Now as to the Statute of 28. E. 1. of Articuli super chartas cap. 3. the scope and purport of which Stat. is for to limit their Jurisdictions, and therefore (as it hath been well observed, there was a mischief before the making of this Statute, and for the redresse of which this Statute was made, but this Statute is so doubtfully penned, as never was the like, and the whole construction of this Statute, doth chiefly rest upon the place where the true (comma) ought for to be, and upon the true relation of the words to couple all together, it must be held, that in trespasse done within the Verge, both parties ought for to be of the Household. The Statute is in the Negative. First, it sets down what matters. Secondly, between what persons. Not of Freehold, nor of Debt, Covenant, nor contract, (if they had stayed there, they had then been stripped out of all Jurisdiction. No Freehold there determinable, many Debts, Covenants, and contracts are there: if an Action upon the case in this nature be there brought, they shall there hold plea of this. Then as touching actions upon the case upon promises, for Debt, Covenant, or Contract, such actions upon the case for promises were first invented for to ouster the partie from ley gager, this is all the Negative part of the Statute. Now as to the affirmative part of it: But only of trespas, del hostel, and in this it is to be observed, what trespasses then were done. And thirdly, between what persons. First, no Trespasse, but del hostel, & ultra, of Trespasses within the Verge, and of Contracts, and Covenants within the Hostel. In cases of Trespasse, there one of the parties ought for to be of the house-

Fleta lib. 2. ca. 3.

Stat. of 28. E. 1, of Articuli super chartas cap. 3.

hold,

hold, but in cases of Debts, there both parties ought for to be of the household. Also, there actions there ought for to be attached, where the Court is resiant. A difference may be made here upon the difference of persons, as if an Action be brought between two of the houshold, and hanging this Action, the Plaintiff is discharged from his service in the household, by this his Action falls to the ground, but otherwise it is where the Defendant is discharged. But in cases of Trespasse, the Law hath made a determination of this, if the same be between one of the household, and the other not, this is good. Fitz. Nat. Bre. fo. 241. hath there two Cases upon this matter. In Trespasse, the same ought to be attached where the Court is sitting, and not otherwise, and for the Jury to try the same, if it be for a thing done within the verge, the Jury shall then be of the Country adjoyning, if it be of a matter done within the household, then to be tried by a Jury of the household, if it be in a matter where one is of the household, and the other is not; this Triall shall be of two Counties, and for the proximity of the County, if one of the household be sued for a Trespasse done within the verge: the Jury shall be of the verge, but of those within the household, and upon this Statute, since the making of it, it is their common and usuall course there, for to say that one of the parties was of the household, whereas he was not, but the Law meets with this, and gives an averrement in this case, unto the partie for to aver the contrary, and this is given to him by the Statute of 15. H. 6. cap. 1. and in such a case, where one of them is not of the household, and they proceed, all is coram non judice, and by the statute 15. H. 6. cap. 1. the parties shall not be estopped by their allegations there, but may averre the contrary, and so by that statute, it cleerely appears, that one of the parties ought for to be of the household, in 6. R. 2d. Brooke title Action upon the Statute placit. 49. the last case, where it was pleaded, that neither of the parties was of the household. In Trespasse it is sufficient, if one of the parties be of the household. Now as to their usage there, they do ever seek to adde what they may, by way of incroachment unto their Jurisdiction, and are not content for to determine matters within the verge, but they will far exceed their limits, and deale with Forreiners, and also with forraine matters, as to Booke cases remembred, no hold is to be taken of them, being but opinions only, the Book only to be relied upon, is the Book of 10. H. 6. fo. 13. that being a case upon the estate, and the Law is, truly there taken, that if none of the parties be del hostel le roy, the same is not there to be tried, for if he owes us attendance there, he shall not then be subject unto their Jurisdiction. If one will have an action upon the Stat. where none of the parties were of the household, he well may, and so are the Books, and presidents, and so is 32. H. 6. which hath been remembred, and is put Coke 6. pa. fo. 20. in Michelborns case, in Trespasse for cancelling of a Bond vi & armis reversed, because that none of the parties, del hostel re roy. In case of a Writ of error to reverse the Judgement, as this principall case is, there is no Book case in point to warrant it, but many Actions upon the Statute brought here is cleerely sufficient cause of error in this case for to reverse the Judgement. In Debt, Covenant, and Contract, both the parties ought to be of the household, but in Trespasse, it is sufficient, if but one of them be of the household, but here in this case, none of them was of the household. And so all the Judges did cleerely agree upon Michelbornes case, Coke 6. pa. fo. 20. and upon other Authorities, that this Judgement here given is erroneous, and so therefore the same ought for to be reversed, and according to their resolutions, the Judgement was reversed, and the reversall pronounced by Yelverton Justice.

Nota, the difference where the Plain. and where the Defendant is discharged, hanging the suit.

6. R. 2d. Brook tit. action upon the Stat. pla. 49.

Judgement reversed per curiam.

Nota, that in this case the three Judges, (s.) Croke, Williams, & Yelverton did agree cleerly, that in all Actions, there both parties ought to be del hostel le roy, or else the matter is out of their jurisdiction. But in this point Flemming chief Justice did differ from them in opinion, for he agreed, that in Debt, Covenant, and Con-

Contract, both parties ought to be del hoſtel le roy, but in Treſpaſſe it is ſufficient if one of the parties only be of the houſhold, and in ſuch a caſe they have good juriſdiction of the cauſe, quod nota.

## *Suckfield* Plaintif againſt *Conſtable* Defendant entred Mich. 9. Iac. B. R. Rot. 330.

An Action of treſpaſs for cancelling of a Deed.

IN an Action of Treſpaſſe, Quare vi & armis brought againſt the Defendant, for cancelling of a Deed, the Plaintiff in his Declaration ſhewes, that the Defendant was ſeiſed in Fee of certain Land, and of this did Enfeoffe I. S. and his heires with warranty, reſerving to himſelf a yearly Rent with a clauſe of diſtreſſe for the ſame, if not paid, that afterwards the Defendant, by his Deed did bargaine and ſell the ſaid rent to the Plaintiff, for the cancelling of which deed (the which the Plaintif caſualiter amiſit) for this the action brought, (but doth not ſhew in this Declaration, that he was at any time before poſſeſſed of this deed, but only by his implication argumentative. The Defen. doth travers the grant of the rent, that no ſuch bargain was made, Non barganizavit. The queſtion was, whether here was a good Travers taken, or not, whether this matter, to which the Traverſe was taken, be traverſable or not, the ſame being only matter of conveyance to the Title. Triſt for the Plaintif, that this Traverſe is not good, and ſo the plea in Bar inſufficient, and Judgement therefore to be given for the Plaintiff, here the action is brought for cancelling of his deed, by which the Plaintiff makes title to himſelf, and ſo this being only matter of conveyance to his Action, and no matter of ſubſtance, this is no matter traverſable by him, and ſo his Traverſe taken to this, is not good, and ſo is 19. H. 6. fo. 29. & 30. Brooke tit. travers pla. 72. in a Writ of right of gard, ſuch a Traverſe there taken, and the ſame held not good. Hen. Yelverton for the Defendant, that the Traverſe here is well taken, neither could the Defendant here in this caſe have taken a better traverſe, for in regard that the Plaintiff in his own Declaration, hath ſet forth his title, by this he hath given unto the Defendant, ſuch an advantage for to Traverſe this, if he will, (the which otherwiſe without ſuch expreſſion of the Plaintiff) the Law would not have given this liberty unto him, here the Plaintiff might very well have brought his Action of Treſpaſſe, for the cancelling of a deed generally, and this had been good, and then ſuch a Traverſe taken by the Defendant, had not been good, but as this caſe here is, the travers is good, and well taken, for here the Plaintiff himſelf by ſhewing of his title, gives to the Defendant advantage for to Traverſe the ſame. Alſo the Declaration here is not good, for that the Plaintiff hath not ſhewed in his Declaration, that ever he was poſſeſſed of the deed, and this he ought ſpecially to have ſhewed in his Declaration, for which omiſſion, the Declaration is not good. Flemming chief Juſtice, the Plaintif here ought to have ſhewed in his Declaration, that he was poſſeſſed of this Deed before, the which he hath not done, but only in this manner, and that argumentative, and ſo the Declaration is not good. But the whole Court was cleere of opinion, that the grant here is not Traverſable, and ſo the Traverſe taken to it is not good, but by the whole Court the Plaintif ought here in his Declaration to have ſhewed that he was poſſeſſed of the Deed, before which he hath not done, and ſo for this omiſſion, the Declaration is not good, and ſo the Rule of the Court was, quod querens nil capiat per billam.

What matter traverſable, and what not.

Judgement for the Defendant, &c.

*Lutterell*

## *Lutterell* Plaintif againſt *Weſton*, or *Weſtorne* Defendant, entred Mich. 8. Jac. B. R. Rott. 602.

NOta, that in a triall at the Bar, as touching the cuſtome of a Coppyhold Mannor, the Caſe appeared to be this, the cuſtome of the Mannor was, that Coppyholders for life, may make a leaſe for one year only, ſuch a Coppyholder made a leaſe for one year, Et ſic de anno in annum, during the life of the Coppyholder, ( excepting one day, at the end of every year, for the Coppyholder to enter, and this only for to avoid a forfeiture, this was moved for a queſtion upon the triall here, whether this ſhould be a forfeiture of his Coppyhold eſtate or not. Williams Juſtice, cleere this is a forfeiture of his Coppyhold eſtate, and this his excepting of one day at the end of every year, is but a meere invention, and a ſhift, which will not ſerve his turn, to avoid his aforfeiture, but in this his ſo doing, he hath deceived himſelf, and cannot by this avoid the forfeiture of his Coppyhold eſtate, the whole Court did agree with him herein, that this was a cleere forfeiture of his Coppyhold eſtate, the jury found a ſpeciall verdict, and the caſe for to be, that the Coppyholder did covenant with the other, that he ſhould have his Coppyhold Land during his life, excepting to him at the end of every year one day, during his life, the Jury found theſe Articles of Covenant, and his entrie the 25. day of March, according to his exception, and ſo this left to the Judgement of the Court, whether this was a forfeiture or not at this time. This was adjourned over to be moved again, and afterwards Termin. Mich. 10. Jac. this was here moved again, and the Court was cleere of opinion, that this was a forfeitnre. Williams Juſtice, if a leaſe be made de anno in annum, this muſt of neceſſitie be a leaſe for 22. years, and ſo is Potkins caſe in 14. H. 8. fo. 14. As to the reſervation of one day, at the end of every year, to make this a leaſe but for one year, and ſo to be warrantable by the cuſtome, and to avoid the forfeiture, this is not any wayes at all matteriall, for this ſhall be a forfeiture, this notwithſtanding, here by this his invention, he hath a purpoſe for to deceive the Lord, and here, by, and with his skil, he hath by this deceived himſelf. Flemming chief Juſtice, this is but a meere invention deviſe for to deceive the Lord of his Forfeiture. It is a plaine caſe here, that he hath let his Coppyhold Land, from year to year during his life, and as to the exception, by way of reſervation of one day, at the end of every year, this will nothing at all availe him, if he had excepted a moneth, at the end of every year, this would have been to no purpoſe, for this is a leaſe by him made for a longer time, then the cuſtome will warrant him for to do, and ſo this is a very plaine caſe, and without any queſtion at all, that by this leaſe in this manner by him made of his Coppyhold eſtate, his Coppyhold eſtate is cleerely forfeited. Williams Juſtice, he hath here made a ſnare for another, and hath catched himſelf in the ſame, and ſo the whole Court cleere of opinion, that this leaſe is a Forfeiture of his Coppyhold eſtate, and that ſuch a kind of Leaſe is not to be allowed of, for then by this meanes, all ſuch Coppyholders may defeat the Lords of the benefit of their Forfeitures, which the Law, and cuſtome hath given to them. And ſo by the rule of the Court, judgement was given for the Lord againſt the Coppyholder, that by this his leaſe thus made, his Coppyhold eſtate Forfeited unto the Lord, both by Law, and by the cuſtome of the Mannor.

A Leaſe for one year by a Coppyholder &c.

Judgement given by the Court for the Lord againſt the Coppyholder.

*Saxey*

## *Saxey* Plaintif againſt *Whempſon* Defendant, entred Mich. 9. Jac. B. R. Rott. 359.

Error for to reverſe a judgement in debt, &c.

IN a Writ of Erroꝛ foꝛ to reverſe a Judgement given in an Action of Debt in London againſt William Saxey, alias dictus Saxex, this variance was alledged foꝛ error. Williams Juſtice, if he were named (Saxex) in the originall, and Saxey in the alias dictus, this would be a cleere variance, foꝛ that he ought to declare againſt him, by the name that he was at the time when he ſealed the Bond, and as he is named in the condition, and that the alias dictus, is foꝛ no other purpoſe, but to make the name foꝛ to agree with the name in the Bond. Yelverton Juſtice, if the Action be bꝛought againſt I. S. who at that time was an Eſquire, and afterwards he is made a Knight, there he ſhall declare againſt I. S. Eſquire, alias dictus I. S. miles. The whole Court cleere of opinion, that this is no erroꝛ, foꝛ that a y. may eaſily be made an x. this erroꝛ was overruled by the Court, and by the Rule of the Court, Judgement was affirmed for the Defendant.

Judgement affirmed per curiam.

## *Waterſon* and his Wife Plaintifs againſt —— Defendant.

A Writ of error to reverſe a judgement, &c.

IN a Writ of Erroꝛ to reverſe a Judgement, given in an Action of Debt upon a Bond, the Caſe appeared to be this, the Action of Debt was bꝛought in the Citie of Coventrie, where the Debt grew due upon a Bond, this cauſe was removed up hither, afterwards a Procedendo was granted foꝛ to proceed in the Court at Coventry, afterwards by aſſent of all parties, it was agreed foꝛ to be tried at the Guild Hall London, and it was alſo agreed, that the Defendant ſhould plead, conditions perfoꝛmed at London (whereas the Obligation was entred into at Coventry) this was ſo tryed accoꝛdingly, and Judgement given foꝛ the Plaintiff: a Writ of Erroꝛ bꝛought foꝛ to reverſe this Judgement, this aſſigned foꝛ erroꝛ, foꝛ that upon Oier demanded, he ought to plead payment at COVENTRY, and this is a cleere Erroꝛ, as it was urged by Tho. Crew foꝛ the Plaintiff. But by the Rule of the whole Court, in regard that he aſſented foꝛ to plead conditions perfoꝛmed in London, and the Plaintiff aſſented unto it likewiſe, ſo that an aſſent being by all the parties, and a triall had foꝛ the Plaintiff in the Action, and Judgement given foꝛ him, this now is not to be aſſigned foꝛ erroꝛ, by reaſon of their aſſent, and agreement to have it ſo, otherwiſe by the Rules of Law, this could not be ſo done, but it would be clecrely erroneous, but in this Principall caſe here, the conſent, and mutuall agreement of the parties doth well aid all, foꝛ that conſenſus tollit errorem, foꝛ without a conſent, the condition could be tried at no place, but at Coventry. Williams Juſtice, the triall here was only had foꝛ the benefit of the Defendant, and the ſame ſo had by the mutuall conſent of all parties, and thereforꝛe this Judgement is not to be avoided by him, by this erroꝛ now in this manner aſſigned, and thereforꝛe by the Rule of the whole Court, Iudgement was affirmed foꝛ the Plaintiff in the Action.

Judgement affirmed per curiam.

*Benſon*

## *Benton* Plaintif againſt *Aymes* Defendant.

IN an Action of Debt, the Plaintif had judgement, quod recuperet 8. l. Ideo conſideratum eſt per curiam, quod querens recuperat, 8. l. the Clark enters this. In the entring of which Record, he writes, and enters it in this manner. Ideo conſideratum eſt quod prædictus querens recuperet debitum ſuum prædictum de 3. l. and leaves out the b. the ſame being in the Record: upon this meere miſtake of the Clarke in his entrie, the Court was moved to have this amended, and made to agree with the Record which the Court did hold to be very fit, and reaſonable ſo to be done, and accordingly by the Rule of the Court, the ſame miſtake was amended in the Court, quod nota.

A miſtake of the Clerke in entring of the Judgement amended in Court.

## *Fox* Plaintif againſt *Jux* Defendant.

NOta, by the whole Court as a Rule to be obſerved for the Diſcontinuance of Actions. That the Plaintiff cannot diſcontinue his Action, for to ſave his payment of coſts thereby, after a Demurrer, when the cauſe is then by the Demurrer in the judgement of the Court, and in their diſcretion, either for to continue, or diſcontinue the ſame, it is not then in the power of the Plaintif for to diſcontinue his ſuit without the aſſent of parties, and this aſſent he ought to make appear unto the Court.

A rule obſervable touching the diſcontinuance of ſuits, &c.

## *Ingram* Plaintif again Sir *Edward Waterhouſe* Defendant.

NOta, that in a caſe of Privilege by Priority of ſuite, the caſe appeared to be this. Sir Edward Waterhouſe was here arreſted by a Latitat upon a Bond of 2000. l. for the payment of 1000. l. the money due before for Land ſold unto him, the money was brought here in Court after this Latitat here, and before the return of the Writ, an Attachment iſſued in London againſt the ſaid Sir Edward Waterhouſe, by which he was arreſted for divers debts due by him, and for others in which he ſtood bound for Mr David Waterhouſe. Mountague Sergeant Recorder of London prayes the Privilege of the Kings Bench having the priority of the ſuite, and to have the 1000. l. out of Court for Ingram. Hubberd moved the Court for the Creditors in the Attachment, and moved, that the money being here in Court, may not be delivered out of Court, before the debts be recovered in London againſt him be paid and ſatisfied, or that the ſaid Sir Edward Waterhouſe have put in ſufficient Sureties for to anſwer them their debts recovered, in regard that Sir Edward Waterhouſe hides himſelf, and cannot be found. Williams Iuſtice, the Law and courſe of this Court is this, that if a Latitat do firſt iſſue, and an Attachment afterwards, that this Court ought to have, and alwaies hath uſed for to have the privilege, and are not to ſtay their proceedings here, by reaſon of ſuch a ſubſequent Attachment, but as to the motion made by Hubberd, the ſame is very reaſonable and juſt, and not to be denyed, and therefore the Rule of the Court in this caſe was this, that if it be ſo, as the Court is informed, that Sir Edward Waterhouſe ſtood indebted to others, for other ſummes of money borrowed before for him, and not paid, this 1000. l. they ſhall have to pay theſe debts before the other debts paid, for payment of which, he was bound as ſurety with David Waterhouſe, and for his debt, and not for his own, the Rule of the Court was to have this examined, & ſo to have the Court informed, whether this be ſo or not, as is informed, & if this be true,

Priority of ſuit gives juriſdiction to the Court, &c

It is then in the power and diſcretion of the Court, to keep the monie ſtill here, untill the recovery in London had againſt him be ſatisfied, or elſe ſufficient ſurety by him put in, and given for the ſame, and not for to make this Court a means for to ſtrip others of their proper, juſt, and due debts, but it is moſt juſt and reaſonable for him, firſt, to pay his own debts, before he pay the debts of another, and according to this former Rule for priviledge, by Williams Juſtice, in caſe of priority of ſuite, this Court hath alwaies had the priviledge, and juriſdiction, and ſo it hath been oftentimes here adjudged.

The Rule of the Court as touching priviledge and juriſdiction.

## *Baker* Plaintiffe againſt *Nichols* Defendant.

NOta, as touching aide prier of the King, the caſe appeared to be this, that in a Writ of Error to reverſe a judgement, aide was prayed of the King, by the Defendant in the Writ of Error. Hen. Yelverton, no aide ought here to be granted of the King; where Land in Fee Farme is in demand, there the partie ſhall have aide granted unto him of the King, but not here in a Writ of Error, where no Land is in demand. Williams Juſtice without all queſtion, no aide ought here to be granted, and there is no Authoritie in all the Law to warrant the granting of aid in ſuch a caſe of the King, he may well alledge diminution for the King, but he ſhall not have aide of him. Flemming chief Juſtice, as to aide prier, it is very cleere, that no aid ſhall be granted of the King, where no Land is in demand, but only collaterally, but afterwards, when the land comes once in queſtion, then aide ſhall be granted, but never before, and ſo was the reſolution of the whole Court, and therefore in this principall caſe in this Writ, aide was denyed to be granted by the whole Court.

Aid prayed of the King where to be granted, and where nor, &c.

Aid denyed by the Court, &c.

## The King againſt *Cole*.

NOta, that Cole was indicted upon the Statute of 8: H. 6. capite 9. for a Forcible entrie. An exception was taken for to quaſh the indictment, becauſe that in the ſame, the Statute was miſrecited, alledging in the Indictment, that the fine mentioned in the Statute, was by the Statute given dicto domino Regi, whereas the Words in the Statute are Domino Regi, and without the word (dicto) the whole Court were cleere of opinion, that this was a good exception, and ſo hath the ſame divers times before been here adjudged for to be a good exception, and ſo for this miſreciting of the Statute, the exception ruled good, and for this cauſe the Indictment inſufficient, and ſo by the rule of the Court, the party was diſcharged, and a writ of Reſtitution to him granted.

Exception to an Indictment, &c.

Partie diſcharged, and a Writ of reſtitution granted.

*Whiting*

## *Whiting* Plaintif againſt *Wilkins* Defendant, entred Hil. 9. Jac. B.R. Rot. 1062.

An Action of Treſpaſſe and Ejectment, a ſpeciall verdict was found upon conſtruction of a Will.

IN an Action of Treſpas and Ejectment, the Plaintiff declares of a Leaſe for years made unto him by Rob. Simpſon Leſſee for three lives, of ten Acres of Land, and upon not guilty pleaded, the Jury found a ſpeciall Verdict, and the point of the caſe in queſtion, ariſing upon the conſtruction of a Will, whereupon the Caſe appeared to be this, (s) Thomas Whiting being ſeiſed in fee of the Land in queſtion, held in common Soccage, 1. Octobris 1. Jac. apud Downham, made his laſt Will and Teſtament in Writing, and thereby did deviſe the ſaid ten Acres unto Rob. Whiting his younger Sonne imperpetuum, and after his deceaſe the remainder to his Heire Male imperpetuum, with divers the like remainders in in the ſame manner limited proximo filio ſeniori, & hæredi maſculo imperpetuum, after this Will ſo made, Thomas Whiting the Teſtator dyed ſeiſed, Rob. the younger by force of this Deviſe enters, and of this Land makes a Leaſe for three lives unto Rob. Simpſon who made the leaſe for years to the Plaintiff, who by vertue of this leaſe entred, and being put out by the Defendant, brings his action of Treſpaſſe and Ejectment. Denn. for the Plaintiff: The ſole queſtion here is, whether *Rob.* Whiting the Deviſee here, hath by this Deviſe, an eſtate for life, or in taile, if but for life, then he hath forfeited his Eſtate, by the making of this leaſe here for three lives, otherwiſe it is if he have an Eſtate taile by this Deviſe, then there is no forfeiture, he hath here a good eſtate Taile by this Deviſe. It appears by Littleton fo. 133. placito 586. and 15. H. 7. 12. If land be deviſed Habendum ſibi imperpetuum, this is a fee ſimple in the Deviſee, here in this caſe the Deviſe being filio ſuo imperpetuum, & hæredi maſculo de corpore poſt ejus deceſſum, and all in the ſingular number, heire male herein this caſe, the firſt Deviſee hath an Eſtate Tail, and this appears by the ſcope and purport of the Will, and by the ſo often iteration, of the heir Male in the ſingular number, 4. Eliz. in Benloſe Reports, Lands deviſed to one Imperpetuum, and after his deceaſe to the men children of his body, here imperpetuum is only for life, ſee for this alſo, Wildes caſe, Coke 6. pa. fo. 17. b. Alſo by the connexion of the words in the Will, this is to be an eſtate Taile. It appears by the Will that he had only two Sonnes, and the words of the Will, are, Item in like manner, &c. his intent by this was, that the ſecond Sonne named in the Will, ſhould have as great an eſtate by his Will, as the former had, to this purpoſe is the caſe put Coke 6. pa fo. 35. 6. in the Biſhop of Baths caſe, a man doth leaſe the Manor of Dale to I. S. for ſo many years as I. D. hath in the Manor of Sale, and he hath ten years in the ſame, this is a Leaſe for ten years by reference unto a former Leaſe, 20. H. 6. fo. 36. a remainder limited in forma prædicta is good, and 5. H. 4. fo. 3. in caſe of a Will a Deviſe made in forma prædicta and good, ſo here in this Principall caſe, here the ſecond Sonne is to have as great an eſtate, as the former hath, the word Heire is nomen collectivum, 16. H. 7. fo. 15. the next Heire for to have an appeale, the Heire of the Heire ſhall have it, 19. H. 8. fo. 10. a man doth deviſe that the Heir of I. S. ſhall ſell his Land, the Heire of the Heire ſhall ſell, 42. Eliz. B.R. in Purflow and Parkers caſe, where an Annuity was deviſed to the younger Sonne, and by his Will declareth that his Heire ſhall pay this, it was ruled here, that the Heire of the Heire was bound to pay this Annuity, for that the word Heire eſt nomen collectivum, and doth comprehend every Heire, one after another. It was in that caſe adjudged that the Heire of the Heire ſhould pay the Annuity, if in the Deviſe here it had been to the Heires, it would then be agreed for to bee a good Eſtate Taile,

4. Eliz. in Benloſe reports.

Coke 6. pa. fo. 35. in the Biſhop of Bathes caſe.

42 Eliz. B.R. Purflow and Parkers caſe.

35. H. 8. Brook title eſtates, pla. 73. Land given to Husband and Wife, for their lives, & diutius eorum viventis, the remainder to the Heires of their bodies: this is an eſtate Taile executed, by reaſon of the immediate remainder. Cheek and Dales Caſe, in 36. Eliz. B. R. ruled accordingly, that an eſtate Tail executed. It hath been agreed, that if the Deviſe had been to one, and to the Heire of his body lawfully begotten, that this had been a good eſtate Taile, as well, as if he had named Heires. In this caſe here, Rob. the Deviſee hath a good eſtate Taile, and ſo no forfeiture by his making of the Leaſe for three lives, and ſo the Plaintiff under this Leſſee hath a good title, and judgement ought to be given for him. Briſcoe for the Defendant, that Rob. Whiting the firſt Deviſee here hath no eſtate Tail, by the words of this will, but only for his life, and that his Heir Male ſhall be a Purchaſer, and ſhall be in by purchaſe, the caſes which have been put of deviſes, may be all agreed, in 38. Eliz. in Smiths caſe in the C. B. a Deviſe made to the Father for life, remainder to his heir Male. It was there reſolved, that the Sonne was in by purchaſe. Wildes caſe Coke 5. pa. fo. 16, 17. in a manner doth confirm this: alſo by this Deviſe here to the Father imperpetuum, in judgement of Law, this is but an eſtate for life in him, and after his decеaſe, to his heir Male, his Sonne is here a Purchaſor, by the true intent and meaning of this Will: the Father hath an eſtate determinable by his death, mors dividit omnia, and this here is all one, as if he had ſaid expreſſely, that he deviſed the ſame to the Father for his life, the remainder to his heir Male: for by the intent of the will it appears to be ſo, and is to have this conſtruction by Law, and ſo the firſt Deviſee having but an eſtate for life, and making of a leaſe for three lives, this is a forfeiture of his eſtate, and ſo the Plaintiff coming in under this forfeiture, hath no good Title, and ſo judgement ought to be given againſt him for the Defendant, and ſo this caſe was adjourned to be further argued. Afterwards (s.) Termin. Trin. 11. Iac. B. R. this caſe was moved again, and then this queſtion was moved, the Plaintiff claiming by leaſe made unto him from a Leſſee for three lives, whether the Plaintiff ought not in his Declaration to have averred the continuance of the three lives. Haughton Iuſtice, he needs not to averre the ſame. Dodderidge Iuſtice, this averrement here the Plaintif ought for to make, and for this omiſſion the Declaration is not good, for that he ought not to recover, if it doth not appear here to the Court, that he hath a good Title; upon this it was ſhewed for the Plaintiff, that Robert Simpſon was ſeiſed for life, and did make a leaſe for years to the Plaintiff. It was ſhewed for the Defendant, that Simpſon was ſeiſed for three lives, by a leaſe made by one (s.) by Rob. Whiting, who had an eſtate but for his own life, and ſo by this there was a Forfeiture of his eſtate, ſo that the only point, and queſtion in Law was, whether by this will, the firſt Deviſee had an eſtate taile, or only for his life, if an eſtate Tail, then whether the continuance of the three lives, ought not to be averred: for that if they are dead, the Plaint. leaſe is determined, & therefore the lives are to be averred. Croke Juſtice, the Plaintif here needs not to aver the continuance of the three lives. Flemming chief Juſtice, the Leaſe here made by Simpſon to the Plaintiff, is a good Leaſe, and the ſame is to be avoided two wayes, the ſame is either for to be determined in facto, or in Law; if it be determined in facto, that is, to be by the expiration of the time, as if the three lives be ended, then he ought for to ſay ſo, that the lives are ended: otherwiſe it is where the ſame is determined by act in Law, as by a Forfeiture. In this caſe here, in the Barre, the other ſide hath not taken hold of this, as to ſay that this Leaſe is ended, and ſo to be avoided by effluxion of time, and ſo by this, they have admitted ſo much, that the lives have ſtill continuance, and therefore no averrement here is requiſite to be made by the Plaintiffe in his Declaration of the the continuance of the three lives. But as this Caſe here is, in the Barre, they only rely upon the determination of the eſtate, by matter of Forfeiture: and this is the ſole and only matter in Law: and as this caſe here is, the Barre is to be taken ſtrongeſt againſt the Defendant who pleads it, and that is (s.) that the lives are ſtill in being, and ſo the ſame

Cheek and Dayes caſe. 36. Eliz. B. R.

38. Eliz. C. B. Smith caſe. Coke 5. pa. fo. 16, 17. Wilds caſe.

Where an averrement of lives is requiſite, and where not.

ſame is to be here taken, and intended, and that without prejudice to any party, and therefore we may now well proceed unto the diſcuſſing of the matter in Law, for that by the Defendants own pleading, it is ſuppoſed that the three lives are in being, and not dead, inaſmuch as he doth not ſeek, and endeavour to avoid the Leaſe made unto Rob. Simpſon, and ſo conſequently the eſtate and Title of the Plaintiff by effluxion of time, but only for the matter in Law: and the Barre here, doth not extend it ſelf to any other matter, but only to the point of forfeiture, and this is the chief point and matter now to be reſolved, and the determination of this reſts only upon the words of the will of Tho. Whiting, and the conſtruction thereof, and touching the eſtate that did paſſe thereby unto Rob. Whiting his Sonne, whether an Eſtate Tail, or only an eſtate for life, was thereby deviſed unto him by the words and meaning of the ſaid will, and ſo by Haughton, Croke, and Flemming, the Declaration here is good, without any averrement of the continuance of the lives. Dodderidge Iuſtice being of a contrary opinion that the ſame ought to be averred, by the Plaintiff in his Declaration, his Title depending thereon, but afterwards Dodderidge Iuſtice mutata opinione, did agree that the omiſſion of the averrement here, is only helped by this which was urged by Flemming chief Iuſtice, and by no other way; and herein he did agree with him, that the Barre here is for to be taken ſtrongeſt againſt the Defendant that pleaded it. And now as to the matter in Law, he in the ſecond remainder enters, (and under whom the Defendant here claimes) ſuppoſing the Leaſe for three lives made by Rob. Whiting, the firſt Deviſe to be a forfeiture of his eſtate, he having by the will as was conceived an eſtate but for his own life, and ſo the ſole and only queſtion reſts upon the words and meaning of the will, whether Rob. Whiting the firſt Deviſee had thereby an eſtate in Taile, or only for his life: It was urged for the Plaintiff, that by this Deviſe Rob. Whiting had an eſtate Taile, and that Heir Male, in the ſingular number, is all one in a legall conſtruction, as Heirs Males in the plurall number, and to this purpoſe was cited the caſe in 39. the Book of Aſſiſes placito 20. the laſt caſe, and Perkins fo. 35. pla. 171. and Brook title Taile pla. 23. where Land was given to a man and his wife, & uni hæredi de corpore ſuo legitime procreato, & uni hæredi, ipſius hæredis tantum, this was held a good eſtate Taile, by the opinion of all the Iuſtices as Brook obſerveth in his abridging of it, for that this word heire eſt nomen collectivum, and ſhall run unto all the Heires, Hill. Eliz. B. R. in Cheek and Dales caſe, where there was the like limitation, by one unto Roſe his daughter, and to her heir male, and there agreed, that if the firſt limitation had been made to her for life, & after to the heir male of her body, that this is a good eſtate tail. For the Defen. it was urged, that Rob. Whit. the firſt Deviſee, had but an eſtate for life only, & that he can take no benefit of the limitation made unto his Heire. It cannot be denyed, but that the word Heir, eſt nomen collectivum, & it is not to be denyed, but that there is an eſtate Tail here in this caſe, but the ſame is not in Rob Whiting the firſt Deviſee, but in his iſſue Rob. having only an eſtate for his life, and after his deceaſe, to his heir male for ever. Haughton Iuſtice, the queſtion here only is, whether Rob. Whiting the firſt Deviſee by the words and meaning of this will, hath by the ſame, an eſtate for life only, or an eſtate taile; by this will, he hath cleerely an eſtate Tail, notwithſtanding that wills ought to have a favourable conſtruction, yet the ſame ought ſo to be either by matter in the ſame expreſſed, or implyed. A deviſe made of Land to one for ever, and by the intendment of Law, he ought by theſe words for to have ſuch an eſtate, as ought to have continuance for ever, and by ſuch a Deviſe, the Deviſee ſhall have a fee ſimple. Now to examine the words of this Will here in this caſe, the words of the will are to expound the ſame, and the will of the Teſtator thereby. It hath been objected that the word (Heire) in this Will, ſhould go unto the heire of Rob. Whiting the firſt Deviſee, and not to Rob. himſelf, this is not to be ſo, but they are meerly to be referred to himſelf, and to be applied to him, and the rather, by reaſon of the firſt words in the Will, being given

*Hill.* 36. Eliz. B. R. Creek and Dales caſe.

Archers caſe Coke 1. pa. fo. 66, 67.

ven to him imperpetuum. And as for Archers caſe Coke 1. pa. fo. 66. & 67. that makes nothing at all againſtch is, there it is expreſſed, the queſtion there being executorie, no doubt there ariſeth, or is made, as touching the inheritance, there the words (his Heir) applyed to the Sonne: but here in this caſe to the Father, the caſe in 27. H. 8. fo. 27. a. comes neareſt to this caſe, where the Deviſe was of Land to a man, and to his Heirs Males, the Deviſee here by theſe words hath an Eſtate Tail, and there it is ſaid that the Law is favourable to all Deviſes, and will conſtrue them according to the intent of the Deviſor, and for this reaſon (as it is there expreſſed) the Deviſee ſhall have an eſtate Tail, but otherwiſe in caſe of a gift, as appears by Littleton, fo. 6. pla. 31. Brook title Eſtates pla 33. & 18. Aſſiſes pla. 5. here in this principall caſe the meaning of the party doth appear, and the ſame may be collected out of the words of the Will, upon the firſt Deviſe by him, to Rob. his Sonne imperpetuum, if he had ſtayed here, and ſaid no more, then Rob. his Sonne, without all queſtion had an eſtate in Fee ſimple, and when he afterwards nominates Heir, by this it doth plainly appear, that he only intended to him an Eſtate Tail, and no greater nor leſſe eſtate, and ſo then Rob. having an Eſtate Taile, by this Deviſe his Leaſe for three lives made to Simpſon the Leſſor of the Plaintiff is a good Leaſe, and no Forfeiture, and ſo the Plaintiff hath a good Title under Simpſon his Leſſor, and judgement ought to be given for him againſt the Defendant. Dodderidge Iuſtice agreed

2. in opinion that judgement ought in this caſe to be given for the Plaintiff as touching this Deviſe, the ſame being to Rob. his Sonne for ever, and after his deceaſe to his Heir Male for ever, and ſo the like remainders over, touching the words of this Will, and the eſtate of Rob. the Sonne thereby, is the ſole queſtion, whether by the words, and by the meaning of this Will. Rob. the Sonne hath an eſtate in Taile, or only for his life, if he hath an eſtate Tail, then there is no Forfeiture in the caſe, that Rob. the Sonne, by the words true conſtruction, and meaning of this Will, hath an Eſtate Tail, in the Lands to him thereby deviſed. Firſt, in Deeds, for to make an eſtate Tail, the Law will have a beneficiall conſtruction, upon the Statute of donis, &c. Quia voluntas donatoris de cætero in omnibus, & obſervatur, and this is to be ſo in caſes of Deeds, and divers caſes may be inſtanced to this purpoſe, as 5. H. 5. fo. 6. and Perkins fo. 35. placito 169. Brook title, taile placito 12. Land given by Deed, Reginaldo, & k. uxori ejus, & hæredibus eorum, & aliis hæredibus dicti Reginaldi, & ſi dicti hæredes, de dicto Reginaldo, & k. obierent ſine hæredibus de ſe procreat. &c. this a good Eſtate Tail, and to this purpoſe the like caſes are put Coke pa. 7. fo. 42. in Bere-

Coke 7. pa. fo. 40, 41. Bere-fords caſe.

fords caſe, by all which it plainly appeareth how beneficially the Judges have made conſtruction of Deeds for Eſtate Tailes, and this upon the Statute of donis conditionalibus quod voluntas donatoris, &c. à multo fortiori, it ſhall be ſo in caſes of Wills, and the conſtruction of them. If the King grant an Eſtate to one and to his Heirs Males, this is a void Grant by 18. H. 8. Brooks caſe pla. 5. Sir Thomas Lovels caſe, becauſe the King was deceived in his Grant, otherwiſe it were in caſe of a Subject, for there ſuch a Grant would paſſe a Fee-

Littleton pla. 586.

ſimple. Littleton pla. 586. Land deviſed to one Habendum imperpetuum, this is a Fee ſimple, 7. E. 6. *Brooks* caſe pla. 432. if Land be deviſed to a man, to give, ſell, or to do with it at his will and pleaſure, this is a Fee ſimple, by reaſon of his intent to have it ſo; now as to the intent of the Deviſor in this his will; Firſt, if he had meant here to have given the abſolute inheritance to him, and made no reſtraint, but had ſtayed upon the the firſt words of the Deviſe to him imperpetuum, this had been a fee ſimple. Secondly, it is to be conſidered, whether here he have made any reſtraint of this, or not, here he intends by his Will for to paſſe an eſtate of inheritance to him, and hath not made any reſtraint of this, but hath only expreſſed, and expounded himſelf, as touching his intent and meaning, what kind of eſtate of inheritance, he did by this his Will, intend to paſſe unto him, not an abſolute eſtate of inheritance for ever in Fee ſimple, but to him, and to the Heir Male of his body for ever, which is an Eſtate Tail, 9. H. 6. Land is given to

one

one for ever, this is only for his life, and so for ever here, that is as to himself, but otherwise it is in case of a Will, 16. Eliz. Dyer placito 330, 331. Clatches case, construction in case of a Will there made according to the intent of the Devisor here in this principall case, the limitation is to him, and to his Heire Male in the singular number, and Heires Males in the plurall number, are all one, as to the making of an Estate Taile, in this case here it is good in point of limitation. Archers case Coke 1. pa. fo. 66. there the word (hæredi) is a word of purchase, but in this case here, being in the case of a Will, the word (hæredi) is used to an estate in point of limitation, and so as the case here is, it is all one with hæreditus, in the eye and construction of Law, if he had here expressed but an estate for life, as in 9. H. 6. the case had then been otherwise, but here he expresseth nothing certainly, but only he expounds his meaning and shews what estate he intended to passe to Rob. his Sonne, who cleerely hath by this Will, a good Estate Taile, and the lease made by him to Simpson for three lives, is a good lease, and the Plaintiff claiming under this lease hath a good Title, and so Judgement ought to be given for the Plaintiff. Croke Iustice, by the words and meaning of this Will, Rob. the Sonne hath an Estate Taile, and this is very cleere, and plain, a double help there is for this, the Statute of donis conditionalibus, this case being within the Statute, and also the construction of the Will: an estate Taile, as Littleton well observeth, est status limitatus, and it is all one to limit this to Heir Male, and to Heirs Males, quam diu aliquis hæres de corpore extiterit, by this word here (for ever) if he had said no more, it had been a Fee simple in Rob. the Sonne, a Will is testatio mentis testatoris, a man deviseth Land to one, and to his Heirs Males, this is a good Estate Taile by 27. H. 8. fo. 27. If a man devise Land to one, and his Heir for ever, the remainder over, this is a void remainder: but if a man deviseth Land to I. S. and his Heirs, and if he dye without issue, the remainder over, this is a good remainder. If the King gives Land to one, and to his Heirs Males, this is a void Grant, as it hath been observed, because the King is deceived in his Grant, but in case of a Subject, by such a Grant a Fee simple passeth. Frenchams case 2. Eliz. Dyer pla. 171. where an implication in a Devise shall not controule an expresse Devise, by this Will here his intent doth plainly appear, and this word Heir is only the manner of Gradation and Distribution, Heire Male, and Heirs Males all one. Flemming chief Justice, Rob. the Sonne by this will hath an estate Tail, and so the whole Court agreed cleerly in this, that by the words and meaning of the Testator, by this his Will, Rob. his Sonne hath a good estate tail, and so the Lease by him made to Simpson for three lives, is a good lease, and no forfeiture, and the Plaintiff being his under Lessee, and claiming under him, hath a good Title, and ought for to recover, and by the rule of the Court judgement was given, and so entred for the Plaintiff.

16. Eliz. Dye pla. 330, 331 Clatches case

Coke 1. a. pa. fo. 66, 67. Archers case.

Judgement given for the Plan. per curiam.

FINIS.

AN

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The Baile in debt is taken in execution, the principal obſcures himſelf, the baile procures him to be taken by the Marſhalls man, the Debtor by practice, with the principall, Writes to the Marſhalls man, to let the principall being in his cuſtody *ire ad largum*, and that he would ſecure him, and charge the Baile with the debt, all this appearing by oath, the Baile diſcharged out of execution, *fo.*43

Where a priſoner is bailed (being bailable) before the day of the return, and where after, and where the baile is to be, in a ſumme of money, and where the ſame is to be *de die in diem*, body for body, *fo* 45

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Whether a man may have a Barony by prescription or not, and whether the same may be held of any, but of the King, or not, *fo.* 195

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A Contract for payment of rent, on such a feast day, or within 10. dayes after, during the term determined, the contract ended, *fo.* 1

Common extinct by unity of possession, *fo.* 2

A Coppiholder prescribing to have Common, by a *usitatum fuit*, he determining of his estate his common is lost, *fo.* 2

A Coppiholder prescribes to have common of pasture, in the Lords waste, doth purchase the inheritance in fee, with a confirmation by the Lord to him, and his heirs, *cum pertinentiis*, whether this will carry the common, without speciall words with all commons before used, *fo.* 2

A Covenant to save harmless, and a Covenant to injoy an estate, freed from all incumbrances, the difference between them, and as touching an expres Covenant, *fo.* 4

A Covenant precedent in law, qualified by a Covenant in deed subsequent, *fo.* 3

What shall be a principal challenge, and what not, an action of Trespas between the Sheriff that retorned the panel, and one of the Defendants, whether this be a principal challenge kindred, Aliance continuing, or malice appearing between the Sheriff and one of the parties a principal challenge. *fo.* 5, 6, 7, 8.

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The difference between a principal challenge, and where for favour, *fo.* 8

A principal challenge, as consanguinity and not proved, is not good, and how the same is to be tried, and what shall be a principal challenge, *fo.* 8, 9, 10

A Custome of Coppihold mannor, that if any Coppiholder of the mannor commit felony, to forfeit his coppihold estate, whether this be a good custome, and whether the seisin of the Lord,

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Common granted to one, *ubicunq; averia* of the Grantor, *ierint*, the Grantee, to ſhew where the Grantors cattell did go, or no common, *fo.*18

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A conveyance made to one by the name of *Knight*, when he was not a Knight, whether this ſhall make void the Conveyance, and what conſtruction ſhall be made of a conveyance, *fo* 21

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The words of Covenant *Conventum & aggreatum, &c.* whether theſe words make a joint covenant', *fo.*25

Where a Covenant ſhall be ſaid to be joynt, and where ſingle, *fo.*25,26

*Conventum & aggreatum eſt*, between the parties, makes a joynt Covenant, and they ought all to joyne, *fo.* 25,26

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What ſhall make a Converſion, and what not, money tendred for to redeem goods pledged, and a refuſall to receive the ſame, makes a converſion, *fo.*29,30,31

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A man by his claime cannot qualifie his own wrong, *fo.*34

What ſhall be ſaid to bee a good conſideration to ground an Action upon the caſe for a promiſe, and what not, *fo.*41

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Coppyhold Land deſcends to one, he

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What things a Coppiholder may do before admittance may have an action of treſpaſs, and take the profits, *fo.* 41 *fo.* 42

A Coppiholder for life builds a houſe and dies, the coppiholder of inheritance, for that four acres of freehold land not laid to it, according to the Statute of 31. *Eliz. cap* 7. made againſt Cottages, pulls the hou e down, the cuſtome being that no Coppihold Tenant of inheritance, may pull down dwelling houſes, *quid operatur* by this, and what a Coppiholder may do, as touching cutting down of trees, *fo.* 50 51 52

A Cuſtome to be taken ſtrict in a caſe of a coppiholder, *fo.* 52

A Court Baron, by whom to be held, and by whom not, to what mannor the ſame may be incident, and to what not, *fo.* 54 55 56 57 58

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Whether a tenant at will of a mannor may hold a Court Baron, *fo* 55. 56

A Court leet, not incident to a mannor, a man may have, and hold a Court Leet within his mannor by ſpecial grant from the King, not otherwiſe, *fo.* 57

Whether a cuſtomary Lord of a mannor may hold Courts, and grant copies, and whether ſuch a cuſtomary mannor, may paſs by ſurrender and admittance, and touching fines to be paid upon ſuch admittances, *fo.* 57, 58

When a record of a judgement ſhall be ſaid to be well certified, and when not, *fo.* 58, 59

A trial at the Bar, upon an indictment of murder, the priſoner at the Bar, 14 of the jury appeared, ſome of the jury challenged for the King; the Court was moved to have two of the jury drawn out, and the other 12. to try the priſoner; this denied, but to challenge as they are called, and to ſhew the cauſe after the other ſworn, for that the King nor any for him, can challenge without good cauſe, otherwiſe of the priſoner in *favorem vitæ*, may challenge 34. and as many more as he will with cauſe, ſhewed preſently: and any one may challenge for the King, but not to ſhew the cauſe, till the reſt ſworn, *fo.* 84. the Councel for the King challenged all the jury, and put in an appeal, *fo.* 85. and upon prayer the Court aſſigned him councel, but not the Kings councel to be for him, *fo.* 85

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Whether a Confirmation ſhall make a void preſentment good or not, *fo.* 91

Whether a conſideration to pay money or to forbear a ſuit *per breve tempus*, or *per paulalum tempus* be good or not, and what ſhall be ſaid to be a good conſideration, what not, *fo.* 91, 92

A man for common of eſtovers, to his houſe, claimed all the thorns there growing by preſcription, one by the command of the Lord cuts them, he which claims them, as common of eſtovers takes them away, whether for this taking treſpas lieth or not, *fo* 93, 94, 95. with the difference, where the claim is of all, and where but of part of them, *fo.* 94, 95

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A Conſultation, where to be granted to a perſon, being ſtopped by a Prohibition for ſuing for his Tithes, *fo.* 108

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Whether one cuſtome may take away, another *fo.* 116

Touching

Touching challenges of the Jury, by the Appellee, and by the Appellant, for cauſe, and the reſt of the Jury challenged by the Appellee, and a *decem tales* granted, *fo.*121

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Touching confirmations of Leaſes, where they ſhall be good, and where not, if a leaſe be made to one for his own life, & confirmed for the life of another, or if made to one for the life of another, & confirmed for his own life, or made to one for the life of *I.S.* without impeachment of waſte, and confirmed for his own life, what ſhall be wrought by theſe confirmations, *fo.*135,136

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In what caſes a Conſtable having a Warrant from a Juſtice of Peace, may break a mans houſe, and in what not, *fo.*146

Touching a conſpiracy, and an Action upon the caſe brought for a conſpiracy, for conſpiring to indite one where the ſame lyeth after acquitted, and where not, and where a Writ of conſpiracy lyeth, and where not, 149,150,151

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Where coſts entire are to be given by the Jury, and where not, in Actions of battery, and Treſpaſſe againſt two, *fo.*157

Whether a Coppyholder for life may preſcribe, to cut down Timber-Trees, growing upon his Coppyhold Land, or not, with the difference where it is by way of uſage, for reparations, and where not, *fo.*158

What words ſhall make a condition, and what not, and whether the word (*pro*) makes a condition, or not, and when there are Covenants to be performed on both parts, whether the Plaintiff may have an Action of Covenant, without ſetting forth a due performance of what he was to do, *fo.*167,168,169

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ſhould be for the rent of the laſt half year, whether this ſhould make a forfeiture or not, *fo.*189,190

Where a challenge is to a Juror, the King being party, whether to ſhew his cauſe preſently, and how the ſame to be tried, *fo.*194

A Coppyholder ſurrenders to the uſe of his laſt Will, whether the Land doth paſſe by the ſurrender, or by the Will, *fo.*200

A Covenant to ſtand ſeiſed to the uſe of his iaſt Will, or a Feoffer to the uſe of his laſt Will, whether any thing doth paſſe by the Will or not, but by the Covenant, or Feoffer, *fo.*200

What ſhall be ſaid a good conſideration in an Action upon the caſe for a promiſe, what not, as in conſideration of having the benefit of half a voyage in a Ship, promiſed to bear half the loſſes, whether this be a good conſideration, or not, *fo.*202

A conſultation granted, as to the Tithe, but as to the Cuſtome to proceed at Law (and that without any amendment) as the ſame was firſt laid, *fo.*204

Touching the cuſtome of *London* to have a horſe ſtanding in an Inne, to be priſed by his next neighbour, and ſold to pay for his meate, whether this be a good cuſtome, or not, and whether he may by the ſale of the Horſe pay himſelf for a debt due to him for the meat of other horſes, as if one bring many Horſes to an Inne, and after takes all away but one, whether this Horſe ſhall be ſold to pay for all the reſt, or only for his own meat, by the cuſtome, *fo.*207

A Coppyholder by the cuſtome being to make a Leaſe for one yeare only, makes a leaſe for a year, *& ſic de de anno in annum* during the life of the Coppyholder, exceping one day, at the end of every year, for the Coppiholder to enter, whether this be a forfeiture, or not, *fo.*215

D

DEbt for rent reſerved on a Leaſe payable yearly by equall portions at Lady day, and Mich. or within ten dayes after any of the Feaſts, within the Term, debt brought for the arerages, for the two laſt years after the ten dayes, *fo.*1

In debt for ſuch a rent in pleading, whether he is to ſay, *pro duobus annis finitis*, at Mich. or not *finitis* till after the ten dayes, *fo.* 1

The word *dedi* implies a generall warranty, but *dedi pro me, & hæredibus meis* is a ſpeciall warranty, *fo.*3

Diſſeiſin cannot be without a ſeiſin, *fo.* 7,8

Diſturbance in the means to have Seiſin, is a diſſeiſin, *fo.*7

Where the parties have a day in court to plead after verdict, and before judgement, *fo.*7,8

Touching certainty in a Declaration, and what certainty ſhal be good, *fo.*10

*Demiſit* generally good in a Declaration, *fo.*10

A Declaration in an Action upon the caſe for ſeverall conſpiracies, whether good or not in one Declaration, and a Demurrer for this cauſe, *fo.*15

An Action of debt, where the ſame is to be in the *debet* and *detinet*, and where in the *detinet tantum* being brought againſt an Adminiſtrator, for rent due in his time, and where he ſhall be charged, *de bonis teſtatoris* (s.) and if not, when he ſhall be charged *de bonis propriis*, *fo.*22,23

An Action of Detinue for a pledge after tender of the money, and refuſal of it, *fo.*29

Dammages entire given for words, ſome being Actionable, others not, ſhall be ſaid to be given for the words which were Actionable only, *fo.*37

In an Action upon the Caſe for a promiſe brought againſt an Executor, and doth not aver in his Declaration, that he hath aſſets, whether the Declaration good, *fo.*41

A Coppiholder deviſeth his Land to I. *and* R. his two ſons, and to the heirs of their two bodies begotten, and wills, that each of them ſhall enter at their ſeverall ages of 21. yeares, that his Executors ſhall take the profits till they come to their ſeverall ages of 21. years, what eſtate by this Deviſe hath the Sonnes when to enter, and what eſtate the Executors have by this Deviſe, *fo.*42

A man

A man in the first part of his will doth devise land to one, and in the latter part of his will gives it to another, which of them shall have it *fo.* 42

A man deviseth 7. l. to his son, makes his wife his Executrix and dies, she takes another husband and so hath all the goods, the wife dies, whether the husband to pay this Legacy, *fo.* 44, 45

A Declaration in trespass, for stopping a way claimed by the Plantiff, from his house to a mill, and so back again from the mill to his house, and doth not say that this way was appertaining to the house, whether the Declaration be good, or not, *fo.* 47

Debt brought by the son for twenty Marks rent reserved upon a lease made by the father, reserving 20. marks rent, at two feasts, *solvendum* to him, *et hæredibus suis, ad terminos prædictos*, (and doth not say) *per æquales portiones*, the father dies the action brought by the son for the whole twentie marks, and doth not shew how he intitles himself to it, *fo.* 48

The Plantiff to have Damages according to his Count, and not according to the finding of the Jury where they finde greater damages, then the Plantiff counts upon, *fo.* 49

Damages given by the jury for the wounding, which was not found whether these damages are well given or not, *fo.* 64

A Demurrer to a writ of appeal, *fo.* 69, 70. for that the same is *minus sufficiens*, to cause the Defendant for to answer, whether the cause, ought to be shewed, wherefore the same is *minus sufficiens*, or not, with the difference where the same is matter in Law, and where not, but matter in fact, *fo.* 70

A Declaration in an appeal, ought to be on the day of the return, or the appeal lost, *fo.* 71

Where a *Distringas* shall issue to the Coroners, *fo.* 75 and where the same shall be to the new Sheriff, and where not, *fo.* 75, 76, 78, 79

Where a Declaration in an appeal is good, and where not, *fo.* 77, 78, 79, 80, 81. 82, 83

In a Declaration upon a lease made by *St. Johns Colledge* in *Oxford*, omitted *hic in Curia prolata*, whether the Declaration be good or not, *fo.* 119, 120

The Declaration, in an action upon the case for a promise was this, the Plantiff sold a house to *I. S.* the Defendant being present did assume in consideration of the said sale, if *I. S.* did not pay him he would, and doth not lay that the sale was so made at the instance, and request of the Defendant, and the promise, laid to be after the sale, whether this Declaration be good or not, *fo.* 120, 121

A Declaration grounded upon breach of promise, the same being to procure an indenture, and a surrender, no place set down, where this was not shewed, that he was to procure such a one to surrender, whether this Declaration be good or not, *fo.* 124, 125

Touching a Discontinuance of Proces, what shall be said to be a discontinuance of proces, and what not, whether the same day that one proces is determined, the partie ought to take out a new proces or not, and whether the same ought to be done presently, and to be dated, on that very day, as the other was determined, or not, and if there be any interim of time between them, whether this will make a Discontinuance, of the whole or not, *fo.* 143

A matter in Law, touching an award continued, by an entrie upon the roul with a *Curia advisare vult*, untill such a term, the parties overslip a whole term without moving any thing, whether this shall make a discontinuance of all the proceedings or not, and what continuance is to be of proces, or otherwise hanging the matter upon *Curia advisare vult*, *fo.* 144, 145

A Declaration, in *placito debiti* and declares, as for an Annuitie, as in a writ of *de annuali redditu a retro fore*, whether this Declaration be good or not, the same being for 10. l. *de annuali redditu*, *fo.* 151, 152

Whether an action of debt lieth for an Annuitie for years for life, or in

fee or not, the Declaration being, *debet et injuste detinet* (and also (*substraxit*). *fo.* 151, 152

What Declarations are aided by the Statute of 18. *Eliz. cap.* 14. of Jeofales, and what not, *fo.* 152

If words Nugatory be added to a Declaration, having matter of substance in it, whether this shall make the same vitious, or not, *fo.* 152

Whether an action of debt, or a writ of Annuitie, lieth for an Annuitie granted for years, continuing the term, and when the same is ended, and when the action shall be in the *debet, et detinet*, and when not, *fo.* 152

In a Declaration for debt, where the Plantiff is to shew how the debt did grow due, and where not, *fo.* 153

Whether the non-payment of a summe of money expressed in a Proviso, in a deed of Covenants for quiet enjoying, shall be a breach of covenants, and give cause of forfeiture of a bond entred into, for performance of covenants or not, *fo.* 156

Where damages entire, and where several, are to be given by the jury, and where not in actions of battery against two, and in actions of trespass, with the difference between the giving of damages, and costs, *fo.* 157

Touching *Durham*, and the proceedings there in a writ of right, and the Bishop, and where the Bishop *Curiam suam remisit*, and what proceedings are then to be had, *fo.* 159, 160, 161, 162

Touching the power, and jurisdiction of the Bishop of *Durham* before the Statute of 27. *H.* 8. *cap.* 2 and since as touching the pardoning of great offences by him, *fo.* 160

Whether a Recovery in the common place of lands in *Durham* be good or not, *fo.* 160

Touching a discontinuance, where tenant in tail is, the remainder in tail, the remainder to the right heirs of tenant in tail, tenant in tail bargains and sells, and levies a fine to the bargainee with proclamations, with warranty, whether this shall make a discontinuance, and what shall be discontinuance, what not, *fo.* 162, 163, 164, 165, 166, 167

Touching Devises, and whether a house in *London* may by the custome, pass by devise without the aide of the Statute of 32. *H.* 8. *cap.* 28. of leases, *fo.* 165

Touching Dower, and where the wife shall be endowed of a base fee, *fo.* 165

The Plantiff declares in an action of Covenant for breach in not paying of money covenanted to be paid for the fraught in a Ship, (*pro tota tranfretatione omnium premissarum*, and doth not set forth performance of his part, being to provide the Ship to sail with the first winde out of the Isle of *Lin* to such a place, whether this Declaration be good or not, *fo.* 167, 168, 169

The Plantiff Declares in an action upon the case for a promise, that he at the request of the Defendant, (but with the Plantiffs own money) he did buy certain Wares, which were for the Defendant transported into *Ireland*, the Defendant assuming, to repay the money so by the Plantiff laid out for him, for non-payment the action brought, whether this Declaration be good, with an averment that these goods came to the Defendants hands, and where such an averment is necessary to be in a Declaration, and where not, *fo.* 169

*A* Declaration in assault and battery by the master, for beating of his servant, and doth not *say per quod servitium amisit*, whether this be good, or not, *fo.* 173

A man by deed during coverture makes a joynture to his wife; afterwards the husband and wife joyn in a fine of this land, the husband dies, whether the wife shall now have Dower or not, *fo.* 173

Where money is to be paid at a day to come, by an award made, or otherwise shall be said to be a duty presently before the day of payment, and where not, *fo.* 178, 179

Where Diminution may be alledged upon the certifying of a transcript of a record of indictment for fellony, and an outlawry upon the same, and where it is sufficient to remove the Transcript upon a *certiorari*, and where

where not, *fo.*181

Whether a variance in a Declaration by a misnomer shalbe aided or not, the variance being between the Originall and the Declaration, *fo.*184

Whether the Devise of a Remainder of a Term for years be good, or not, with the difference between a Grant and a Devise of a Terme, with a remainder over, *fo.* 191,192, 193,194

In an Action of Trespasse for the cancelling of a Deed,& doth not shew in his Declaration that he ever was possessed of the deed,whether this Declaration be good or not, *fo.*214

Whether the Plaintif after a Demurrer may Discontinue his Action to save payment of costs, when the cause by the Demurrer is in the judgement of the Court, whether such a Discontinuance may be without assent of parties,and the Court acquainted with it or not, *fo.*217

E

ELection by agreement for payment of rent reserved at the Feast day, or within 10. dayes after, within the term for the last payment, the agreement being determined, the Election is gone, the terme being ended, the contract for the 10.dayes is determined, *fo.* 1

Error in *facto* to reverse a judgement, where the same may be, and where not, *fo.* 5,& 7

Error to refuse, to admit of a principall challenge taken, *fo.*5,6

Error to reverse a Judgement for matter of variance, *fo.*7,8

Not to assign for error, matter of Abatement, which ought to have been pleaded, and omitted, *fo.* 9

Error for want of a Warrant of Attorney entred in such a Term, *fo.*21

Where an Executor, or Administrator, shall be charged, *de bonis propriis*, and where not, *fo.*22,23

An Executor, or Administrator is in the first place to pay rent reserved, before other Debts, *fo.*23

An Executor may waive the possession of a Term to be discharged of the Rent, and then not to be charged with the Arrears of Rent *de bonis propriis*, *fo.*23

What shall be assigned for error, and what not, after judgement, *fo.*24

Error to reverse a judgement in a Writ of right, because the Plaintif did appear by his *procheine amy*, and at his full age, did prosecute his suite, and recovered *per procheine amy*, whereas it should have been in proper person, or by Atturney, and whether this may be assigned for error, after judgement, or not, *fo.*24

Not to assign taha for error, that which is contrary to the Record, or contraryto the duty of a Judge, 24

Death at any time, may be assigned for error, *fo.*24

Not to assign that for error, of which he could not have advantage by way of plea, *fo.* 25

Not to assigne for error, an error *en fait*, where before he might have had benefit of it, by way of answer, *fo.*25

An Infant cannot make an Atturney, nor appear by Atturney, this at any time may be assigned for error, *fo.* 25

Error Assigned, for that severall Plaintifs joyned in an Action of covenant, *fo.*25

Touching estates, and when they are to take effect, by construction of Law, the same to be as soon as may be, *fo.*27

Error assigned to reverse a judgement, because the same was given on the Essoyn day, and what proceedings may be had, on the Essoyn day, and what not, and touching the returns, and Teste of Writs, on the Essoyn day. Inspection of an Infant good on the Essoyn day. All the Judges by intendment of Law, to be ready in Court the first day and so they used to be, *fo.* 32,34,35,36

Error to reverse a Judgement for that at the time of the judgement, the party against whom was an Infant, & *hoc paratus est verificare prout Curia vult*, this no error, otherwise if he had concluded & *hoc paratus est verificare* only, this had been good, and traversable, *fo.*37

Error to reverse a judgement in an action upon the case for words, for that some words being actionable, and others not, the Jury gave intire dammages

damages this no error, for, that the damages are taken to be for the words actionable, *fo.* 37

Error upon a judgement in waſte, the jury found the waſte in the places aſſigned, and in another place not aſſigned, and damages for the whole, *fo.* 37, 38

A man takes to wife, an executrix, the debts paid, he hath goods in his hands to pay legacies, the wife dies, whether the ſurviving husband may be ſued by the Legatees in the Eccleſiaſtical Court, for their Legacies, or not, *fo.* 45

Error for a miſtryal, in a *quare impedit* upon the grant of the next avoydance in *London*, to a Church in the County of *Wigorn*, the iſſue being *quod non conceſſit*, *fo.* 47

Error to reverſe a judgement given in *detinue*, becauſe judgement was given according to the finding of the jury, they finding greater damages for the Plantiff then he counted upon, *fo.* 49

Error to reverſe a judgement given in an action of treſpaſs againſt three, the firſt pleads to all, *non Culp.* the ſecond, pleads as to part, *non Culp.* the third, as to another part pleads *non Culp.* iſſues joyned againſt them all, the jury found the firſt guiltie of the whole, the other guiltie of the ſeveral parcels, and aſſeſſed damages entire for the Plantiff, and judgement given accordingly, error *quia Juratores ſe male geſſerunt, in verdicto dando*, whether this be error or not, *fo.* 50

What exceptions ſhall be good, in a leaſe of the King, and of a common perſon, and what not, *fo.* 55, 56

A writ of error to reverſe a judgement given at *Durham*, the records certified to be taken before eight being removed, it appeared to be taken before nine, whether a writ of error *de recordo quod coram vobis reſidet* ſhall be, or not, and whether the Judges may proceed to examine the errors upon the record certified, and in Court, 58, and 59

Error to reverſe a judgement given in debt for 20. l. rent, becauſe the Plantiff in his Declaration did not ſhew, how the rent grew due, whether this be a good error, *fo.* 65

Error to reverſe a judgement in debt, for that judgement was given againſt the ſuretie, no judgement being given againſt the principal, 2. error, judgement againſt the ſuertie, *tam pro debito, quam pro* 20. coſts, no judgement being againſt the principal, 3. error, the judgement was, *quod ſit in miſericordia*, whereas it did not appear, that there was any appearance to warrant the judgement, whether the judgement be erroneous for theſe errors, *fo.* 65. and whether this judgement given at *Briſtol*, according to the cuſtome ſhall be made good by the cuſtome, *fo.* 65

Error to reverſe a judgement given in debt, in the Court of Marſhalſie, in an *indebitatus aſſumpſit*, for not ſhewing how it grew due, *fo.* 67

Error for that the bail was not entred as it ought to be, being but for part, where it ought to be according to the judgement. *fo.* 107 error in *adjudicatione executionis*, *fo.* 107

Touching extinguiſhments, a man having a leaſe for years in his own right, afterwards the reverſion of the inheritance of a moity thereof deſcends upon his wife, whether the deſcent of the reverſion of this moity coming to him in right of his wife, ſhall extinguiſh, and drown the right, and intereſt in the term which he had in his own right, or not, *fo.* 118 119

In an *ejectione firme*, whether it is ſufficient to prove the ejectment at any time after the leaſe made, and before the action brought, *fo.* 122

For Error aſſigned, that an amerciament (being offered) was unreaſonable, whether this may be aſſigned for error, and whether a *moderata miſericordia* may be had in ſuch a caſe, *fo.* 125

Whether the principal, and bail may joyn in a writ of error, or not, *fo.* 125

Touching aſſigning of errors in law, after an error in fait aſſigned, and how the ſame to be aſſigned errors in the body of the record, *fo.* 125

Error in the judgement in an inferiour Court being, *quia videbitur Curia*

*ria ideo conceſſum eſt per Curiam*, whether a good error, *fo.* 125, 126 for *conſideratum*,

Error to reverſe a judgement given in a Trover and converſion of 300. *Toddas lanæ*, whether good or not, *Barrellas cerviſiæ et pipas vini*, *fo.* 126, 127

Error to reverſe a judgement given at *Durham*, by force of a commiſſion directed to 9. and the ſame executed by 8. this appearing upon certifying of the record, whether this be error, *fo.* 129, 130, 131, 132

*Bre. do* error, *de Recordo quod coram vobis reſidet* where to be, *fo.* 129, 130, 31, 132

Error to reverſe a judgement given at *Durham* againſt an infant, for that he being an infant did appear by an Attorney, whereas he ought to have appeared by his gardian, whether this be error or not, *fo.* 129, 130, 131, 132

Error, that a judgement was given at *Durham*, by 8. by force of a Commiſſion directed to 9 whether this be error or not, *fo.* 129, 130, 131, 132

A rent granted to one for his life,

A rent granted to one, and to his heirs, *Habendum*, for his life, and for the life of 3. others, what eſtate this grantee hath in the rent, *fo.* 135, 136, 137, 138

What ſhall be ſaid to be a forfeiture of an eſtate, and what not, if tenant for life do make a feofment in fee to *I. S.* and his heirs for the life of the feoffor, whether this be a forfeiture, or not, and what ſhall be ſaid to be a forfeiture, and what not, whether an eſtate that paſſeth by way of limitation, ſhall make a forfeiture or not, *fo.* 135, *et* 136

What remedy an Obligor ſhall have againſt the executor of the Obligee to have the bond delivered up, the money being paid to the teſtator in his life time, and his promiſe to deliver up the bond, and what actions are maintainable againſt an executor upon a ſimple contract, or promiſe upon good conſideration with the teſtator, *fo.* 158

Error to reverſe a judgement given at *Durham*, whether a judgement final is to be given in a writ of right or not, *fo.* 159, 160, 161, and 162

An infant, appearing by his gardian comes to his full age, continues ſtill by his gardian, whereas he ſhould have been by Attorney, judgement given for him, and this aſſigned for error, whether this be error or not, *fo.* 171

Error to reverſe a judgement given againſt an infant *quod capiatur*, whether this be error or not, *fo* 172

Error to reverſe a judgement in an inferiour Court, being *conceſſum* for *conſideratum*, and a *capiatur* for a *miſericordia*, *fo.* 179

The Earldome of *Arundel*, the only Earldome by preſcription, *fo.* 196

Error to reverſe a judgement in an action of debt brought by an executor, and doth not ſay (*et profert hic in Curia literas teſtamentarias*) whether this be error or not, and whether this clauſe be matter of ſubſtance, or of form, *fo.* 200

Error to reverſe a judgement in debt, for that he then was and ſtill is an infant within age, whether this be a good error, and how the Court is to proceed for his inſpection, *fo.* 205

Error to reverſe a fine for want of Proclamations, the Proclamations reverſed, but the fine remains a good fine at the common Law, *fo.* 206

Error to reverſe a judgement given in the Court of Marſhalſie in a Trover and converſion, for that none of the parties, at that time were of the houſhold, whether this be a good error to reverſe the judgement or not, *fo.* 207, 208, 209, 210, 211, 212, 213 214

Error to reverſe a judgement in debt, for matter of variance (*S.*) *Saxey*, *aliás dictus Saxex*, whether this be error or not, *fo.* 216

Error to reverſe a judgement in debt, for that the Defendant pleaded conditions performed in *London*, whereas it ſhould have been at *Coventry*, but this being ſo done by aſſent of parties, whether this ſhall be error, *fo.* 216

A man by will deviſeth land to *Robert* his younger ſon *imperpetuum*, and after his deceaſe, the remainder to

to his Heire Male *imperpetuum* with divers like Remainders, *proximo filio seniori, & haeredi masculo imperpetuum*, what estate by this devise *Robert* hath, whether for life, or in Taile, *fo.*219,220,221,222,223

F

Land given in Frankmarriage by one with his daughter, when she, and her Husband were both of them *infra annos nubiles*, a divorce at full age sued by the Husband, by this the Frankmarriage is destroyed, *fo.*2

A Feoffement by one Coparcener of a Mannor, made of the whole Mannor, carries but a moity, *fo.*4

What Offences are Felony, and what not, in regard of the place where done, *fo.*13,14

Goods morgaged. and not redeemed, not to be forfeited by outlawry, *fo.*29

A Coppyholder for life builds a house and dyes, the Coppyholder of inheritance pulls this house down, contrary to the custome, whether this be a forfeiture, and what shall be said a forfeiture of a Coppyhold estate, what not, *fo.*50,51,52

All Franchises are derived from the King, *fo.*55.56

One Fee simple cannot depend upon another, by the rule of Law, *fo.*63

What shall be said to be Felony, and what not, in case of a Purveyors wrongfull taking within the Statute of 5. E. 3. cap. 2. and by a Deputy Purveyor, *fo.*96,97,98,99. and what taking by a Purveyor shall be said to be felony, and what not, *fo.*98,99

As touching Factors, and how they are to demeane themselves in the due performance, and execution of Authorities, given to them by their Masters, *fo.*103,104,105

The burning of a Barn with Corn, whether this be Felony by the Common Law, or whether only by the Statute of 23. H. 8. cap. 1. fo. 112. Clergy taken away from such a Felon by the Statute, *fo.*112

Touching the forfeiture of a Bond, being condition to sell a house to I. S. before sale made to him, he sells the same to I.D. whether the Bond by this be forfeited, *fo.*117

Touching a fine levied by Tenant in Taile, remainder in Taile, whether this fine, with warranty upon it, shall make a Discontinuance, or not, *fo.*162, 163, 164, 165, 166, 167

Lessee for years rendring rent payable at Mich. with a condition of reentry for non-payment before Mich, the Lessee is ousted by a Stranger, the Disseisin continues till the day of payment, the rent is demanded, and not paid, whether the Lessor may enter for a forfeiture, *fo* 181,182

A man makes a Feoffement to the use of his last Will, whether any thing do passe by the Will or not, or by the Feoffement, *fo.*200

What shall be said to be a forfeiture of Coppyhold estate, and what not, where by the custome a Coppyholder may make a lease for one year only, he makes a lease for a year, and so *de anno in annum* during the life of the Coppyholder, (excepting one day at the end of every year for the Coppyholder to enter) whether this be a forfeiture of his Coppyhold estate, or not, and what shall be said to be a forfeiture of his Coppyhold, what not, *fo.*215

What shall be said to be a forfeiture and what not, whether Lessee for life makes a lease for three lives, whether a forfeiture, *fo.*219,220,221, 222,223

G

Whether a Grant is to be qualified by the imagination of the Grantor, or not, *fo.*4

A man grants a Mannor, which he hath not, he is not bound by this grant, but by his expresse Covenant, to perform this Grant, he shall be bound, *fo.*4

A grant is good for so much as a man hath power in him to grant, *fo.*4

The Kings grant, how to be construed, where it cannot be to a double intent, it shall be according to the Kings meaning, if to a double intent, whether the same is not void, *fo,*5,6

The Kings Grant made upon the false

falſe ſuggeſtion of the party whether it be void, *fo.*6

When by conſtruction the Kings ſecond grant ſhall begin, there being a former Grant in being, and no expreſſe words when the ſecond ſhall begin, *fo.*5,6

The Kings Grant good, having a convenient certainty therein, and what certainty, is requiſite in the Kings grant, *fo*,10,11

A Grant of a Rent, and a grant of a Common, with the difference between them, fo.18

A Grant of Land with all Commons appurtenant to the ſame, what Common paſſeth by this, fo.18

A Coppyholder having purchaſed the inheritance of his Coppyhold eſtate grants the ſame, with all Commons thereunto belonging, whether the Common before uſed, when he was a Coppyholder, doth paſſe or not, fo.18

Whether in a Grant, the words reputed, or uſed, as part, or parcell, &c. ſhall extend to paſſe Common, fo.19

A Grant of a Tenement, with ſuch Commons, and profits, as had been before uſed by the Farmers, formerly the ſame enjoying, whether by this Common paſſeth, fo.19

A Grant made with a *uſitatum fuit*, to a Termor, where good, and how far available, fo.19

A Grant made of Common by one by the name of *Richard Abbot*, his name being *Robert*, whether this be a good grant, and to what intent the name of the Grantor is put in a deed, fo.21

A Grant which doth *conſtare de perſona* is good, fo.21

A man grants *preſentationem* to one, *Quandocunq; & quomodocunq; Eccleſia vacare contigerit, pro unica vice tantum; Ac inſuper voluit, & conceſſit*, that the grant ſhall remain in force *quouſq; clericum habilem & idoneum* by his preſentment ſhall be admitted, inſtituted, and inducted, whether this Grantee muſt take the next avoidance, or by the clauſe (*Ac inſuper*) may take his preſentation when he will, *fo.*26,& 27,28

A grant of a preſentation to one, to be made by him, or his by Aſſigns, when he will, this a void grant, being contrary to the nature of an Advowſon, fo.27,28

A grant of a preſentation to one, not ſaying the next, when this preſentment is to be made, fo.27

A grant of an intereſt, & of an Authority, and the difference between them, *fo.*28

Tenant in Tail grants the next avoidance, and dyes, before the Church becoms void, whether the grant be determined by his death, or not, & whether this grant be void, or voidable by his death, with the difference where the grant is made, of that which is parcell of the Entaile, and where it is of a thing out of the entaile, 32,33,35

By the grant of a Mannor *rum pertinentiis*, an Advowſon appurtenant paſſeth, but not by a grant of an acre of Land parcell of the Mannor, *cum pertinentiis*, *fo.*35

Tenant in Taile of a Mannor, to which an Advowſon is appendant, grants *proximam advocationem*, (the Church being full) and dyes, whether this grant be void by his death, *fo.*35

Whether a grant by Copy, made by a Coppyholder of a Mannor be good, or not, *fo.*57,58

A man ſeiſed of a Mannor and Tenement in Fee ſimple, and alſo of a Leaſe for years in the Ville of Dale, by deed of bargaine and ſale, doth give, grant, bargain, ſell, enfeoffe, and confirm the ſaid Mannor, and all other the Lands, and Tenements he hath in the Ville of Dale. whether the Leaſe for years doth paſſe, *fo.*99,100,101

Where the grant of the King ſhall be good with generall words, and where not but with a ſpeciall recitall of the eſtate of the King, *fo.*196

H

OF Herbage, and what ſhall be a good Seiſin of Herbage, *fo* 7,9,10

How an heire of Cuſtomary Land in Burrough Engliſh by way of pleading, is to intitle himſelf, whether to ſay, *propinquior hæres*, or *Junior filius*, *fo.* 93. and if the youngeſt ſonne being

heir in Borrough Engliſh dies, who ſhall have the land, *fo.* 93

Touching Herriots, and Avowryes for a Herriot, what ſhall be a good Avowry, and what not, *fo.* 101, 102

Touching the nature of *Habendums* where a rent is granted to one, and his heirs, *Habendum* to him for his life, and the life of three others, *quid operatur* by this *Habendum*, and what eſtate doth paſs by this grant, *fo.* 135

Touching Honours, and the Honour of *Petworth*, and of Arundel, and whether the Honour of *Petworth* is, or may be held of the Honour of Arundel, and how one Honour may be held of another, *fo.* 194, 195, 196, 197

An Honour muſt be drawn, and derived from the King, *fo.* 195

Whether an Honour may be held, or created by a ſubject, *fo.* 195

Whether a man may have, an Honour, a Barony, or an Earldome by preſcription or not, and whether the ſame may be held of any, but of the King or not, *fo.* 195, 196

Whether an Honour may be without a Court Leet to it, or not, *fo.* 196

Touching the Honours of *Dover*, and of *Wallingford*, and how they are holden, *fo.* 196

Whether other mannors may be annexed to an Honour without an Act of Parliament, or not, *fo.* 196

Whether the King may create the Mannor of another to be an Honour, or not, *fo.* 196

Whether an Honour may be created without an Act of Parliament for it, *fo.* 196

Whether Appellation ſhall make an Honour, or not, *fo.* 196

Of what an Honour is to conſiſt (*S.*) of lands liberties, and Franchiſes, *fo.* 197

A *Habeas corpus* to the Warden of the Fleet, to bring in the body of a priſoner in his cuſtody, who refuſing to make his retorn another day, given him upon a pain to retorn the body, *fo.* 201, 202

Touching the word heir, how the ſame is to be conſtrued, being *nomen Collectivum*, *fo.* 219, 220, 221

I

TWo Joynt-tenants of a Mill for years, one grants his eſtate and dies, the other grants, Bargaines, and ſells, *molendinum ſuum* generally, and all his eſtate, right, title, and intereſt, and Covenants, to ſave the vender harmleſs, from all former Acts, and diſturbances, with a bond, to perform the ſame, the vender evicted out of part, brings an action of debt, the bond forfeited, *fo.* 2, 3

Two Joynt-tenants, ſeiſed *per my, et per tout*, one of them by deed, doth bargain, and ſell, *totum ſtatum ſuum*, the other dies before the inrolment, whether a moity only paſſeth or not, *fo.* 3

Two Joynt-tenants, the one grants all which he hath, by ſurvivorſhip takes upon him to paſs all, and bindes himſelf in a bond, to perform it (without any words) of as much as in him was, by an eviction of part, whether the bond is forfeited, *fo.* 3, 4

Whether Joynt-tenants, as to the poſſeſſion of the thing in joynture, are not ſeiſed, by entierties, of the whole, and of every part equally, and whether in right, only of a moity, *fo.* 3

A feme ſole demandant in an Aſſiſe, after verdict, and before judgement takes a husband, whether this be any cauſe to hinder judgement, *fo.* 5

A judgement not to be avoided, but by plea, no time to plead this, between verdict, and judgement, after judgement the time is paſt, *fo.* 5, 6, 7, 8, 9

Where a judgement ſhall be erroneous, for matter of variance, and where not, and where the partie hath a day in Court, and where not, to plead after verdict, and before judgement, *fo.* 7, 8

Touching the courſe in the entring of judgements, where the ſame is to be affirmed, and where to be reverſed *fo.* 11

Judges opinions after argument, not to be ſingled out, to the ſeveral points by any Councel at the Bar, *fo.* 11

Whether

Whether ſeveral conſpiracies may be joyned in one Declaration, *fo.* 15

Not to joyn ſeveral Defendants in one action upon the caſe, for ſcandalous words at the common Law, but otherwiſe in the ſpiritual Court, *fo.* 15

A Juſtice of peace, where in pleading he is to ſhew, how he was ſo made, *fo.* 15

No Injunction to be granted by the Court of requeſts, to ſtay proceedings, in the Court of Kings Bench, *fo.* 20

Where the husband and wife, are to joyn in an action, and where not, *fo.* 21

Whether an Infant, make, or appear by an Attorney, *fo.* 25

Whether of the coming of an Infant to his full age, the Court is to take notice, or whether the ſame ought to be pleaded, *fo.* 25

Where ſeveral perſons, are to joyn in an action of Covenant, and where not. A man bound to three, *ſolvendum* to one of them, whether all to joyn in this action, *fo.* 26

Whether a judgement given on the Eſſoyn day, be good or not, and what pleas may be pleaded on the Eſſoyn day, and what not, *fo.* 32,34, 35, 36

No judgement to be given upon default before *quarto die poſt*, *fo.* 35

Whether an Infant be bound by his promiſe to pay money for his Cure of the falling ſickneſs, *fo.* 39

A diſtreſs is taken by the Bayliffe, for the parties not appearing at a Court Baron, and in an action of Treſpaſs brought for this, the Defendant juſtifies, whether this be a good juſtification or not, and where Cattle diſtrained may be ſold, and where not, and where the diſtreſs ſhall be forfeited, and where not, *fo.* 52, 53

In an action of Treſpaſs, for breaking his Cloſe, chaſing, and driving of his Cattle, the Defendant juſtifies *quoad intrationem, et effugationem*, and ſaith nothing to the breaking, if this juſtification be good or not *fo.* 64

A judgement given upon a Demurrer unto a writ of Appeal, ſhall relate to the firſt day, a day given by the Court for argument thereof, is but only a day of grace, *fo.* 69

After Judges have argued a matter in Law, and upon argument delivered their ſeveral opinions, and ſome of the Judges ſtirred new matter, not moved before at the Bar, nor Bench, and upon this new matter, grounded their opinions, whether this new matter may be argued again at the Bar, and Bench by the other Judges or not, *fo.* 81, 82, 83

An Indictment of murder, the priſoner at Bar ready for trial, and all challenges releaſed, the Jury charged to inquire of the fact, who found two wounds given, the firſt of them to be mortal, of which he died, they finde two wounds given, but ſay nothing of the third, there being three named in the indictment, whether this be a finding according to the indictment or not, *fo.* 86, 87, 88

Touching the power of juſtices of *Niſi prius*, and what pleas may be before them *puis le darrain* continuance, what not, *fo.* 92, 93

An Indictment of murder, being *quod percuſſit*, and doth not ſay (*felonice percuſſit*) whether good or not, and whether the word *Murdravit* doth implie *felonice* or not, or whether *Juratus eſt* doth implie *felonice*, *fo.* 93

Whether a man by grant, or by preſcription may have an intereſt in trees, that grow in *alieno ſolo*, in what caſes, and to what purpoſes this may be, and to what not, *fo.* 93, 94, 95

What ſhall be ſaid to be a good juſtification in an action of account, againſt one as a factor, having Jewels delivered to him to Merchandiſe, beyond ſea for the beſt profit of him that delivered them, *fo.* 103, 104, 105

Touching Innes, and Ale-houſes, not to keep an Inne without a Licence from the King, not to keep an Inne and an Ale-houſe, *fo.* 109

Indictment quaſhed, being *Collis* for *Colli*, but if the partie be outlawed before the Coronors, whether he may then quaſh the indictment by way of exception, or put to his writ of error *fo.* 109

Where husband and wife ſhall joyn in actions, and where not, whether

to joyn in treſpaſſe, *quare clauſum fregit*, or not, *fo.*110,111

As touching Joyntenants and the ſeverance of the joynture, where the ſame ſhall be by a diſcent, or otherwiſe, and where not, *fo.*113

Where a juſtification to ſtop the ancient lights of another, ſhall be good by the cuſtome of *London*, and where not, *fo.*115,116

One is charged for words ſpoken in *Middleſex*, he pleads, and juſtifies as to words ſpoken in *Eſſex*, whether this be a good juſtification, *fo.*115,116

That Judges, and to give judgement according to the verdict of the Jury, as to the matter by them found, *fo.*118, 119

An Indictment, having the word *dedit*, but not *percuſſit*, whether good, or not, *fo.*124

Touching Inrollements of Charters, and the inrolling of Prince *Henries* Charter of his creation to be Prince of *Wales*, *fo.*133

Where the Husband and Wife are to joyne in an Action, as in an Avowry for rent, due before and ſince the marriage, and in other Actions, and where not, *fo.*135

A treſpaſſe to be 7. *Maii*, the Defendant juſtifies the treſpaſſe done 10. *Maii*, and concludes with this (which is the ſame treſpaſſe) whether this be a good Juſtification, or not, *fo.*138

Whether a man may juſtifie, and plead in defence of murder, or not, *fo.*141

In treſpaſſe for breaking and entring his houſe at 11. of the clock at night, and carrying of him before a Juſtice of Peace, the Defendant being a Conſtable juſtifies this by force of a Warrant to him directed by the Juſtice of Peace ſo to do, whether this be a good juſtification, or not, and what ſhall be a good juſtification in ſuch a caſe, what not, *fo.*146

Touching a Juſtice of peace, and the execution of his Warrants by a Conſtable, for bringing one before him, how he is to make his Warrants, and what to expreſſe in them, and whether he is not to expreſſe the cauſe what it is for, in his warrant, *fo.* 146

In an Action of Treſpaſſe, *Quare clauſum fregit*, the Defendant juſtifies under the Kings Letters Patents, (without pleading (*hic in curia prolat.*) whether this juſtification, thus pleaded, be good or not, *fo.*154,155

What ſhall be ſaid to be a good juſtification, and what not, in an Action upon the caſe for a Conſpiracy, for conſpiring to endite the Plaintiff for a ſuppoſed counterfeiting of a letter contrary to the Stat. of 33. H. 8. cap. 1. and whether the grounding of an Indictment, and the proſecution thereupon, upon the ſuſpition of others, and not upon the parties own ſuſpition, whether this juſtification be good, or not, *fo.*149,150,151

Where a Judgement finall ſhall be given, and where not, but a common judgement upon default of the Tenant in a Writ of right, and where, and in what caſes a Judgement finall ſhall be given, and whether the ſame may be given againſt an Infant, and in what caſes upon default, after the miſe joyned in a Writ of right, and whether a judgement final, upon a default, ſhall be given without a *Petit cape* or not, and the difference where the ſame is upon generall default, and where there is an imparlance, and a default *fo.*159, 160,161,162

Touching Inrollements of Deeds of Deeds of Bargaine and ſale by the ſtatute of 27. H. 8. cap. 16. and the relation of the ſame, *fo.*163

Whether an Inkeeper may retaine a Horſe, from the true owner, demanding of him for his meat, till he be paid for, the horſe being there left by a ſtranger unknown to the true owner or not, *fo.*170

Whether a judgement, *quod capiatur* may be given againſt an Infant, or not, and where an Infant ſhall be impriſoned, and where not, *fo.*172

Where Judges are to take notice of particular uſages in ſeverall places, and where not, *fo.*175,176

Where an Indictment upon the Statute of 8. H. 6. cap. 9. for a forcible entrie ſhall be good without ſaying, *adtunc, & ibidem reſtitutus*, and where not, *fo.*177

Judgement in an inferiour Court, *conceſſum eſt*, for *conſideratum*, and *quod*

*quod capiatur*, for *quod ſit in miſericordia*, whether good or not, *fo.* 179

After ſeveral verdicts an injunction granted out of the Chancery prohibiting the partie to pray his Judge, where judgement ſhall yet be granted upon prayer of the Councel, and where not, but by prayer, *fo.* 182

An Indictment for a Riot, againſt ſeveral perſons named, and *I. S.* of *Huttoſt*, and no addition of place for the reſt, whether this indictment be good or not, *fo.* 183

Where a judgement general ſhall be given againſt an Adminiſtrator, *quod recuperet debitum de bonis teſtatoris*, and not a conditional judgement (*S.*) *ſi tantum*, *fo.* 187

An indictment againſt the Lord *Vaux*, for refuſing to take the oath of Allegiance, for which judgement given againſt him according to the Statute of 16. *R.* 2. *cap.* 5. to be in a Premunire, *fo.* 197, 198, 199

Indictment upon the Statute of 8. *H.* 6. for a forcible entrie into a Rood of land, or into half a Rood of land, whether this indictment be certain or not, *fo.* 201

Indictment for erecting of a Gate *apud Horneſey* in Com. *Middleſex*, in *via regia ducent.* unto *Hygate*, not ſhewing in what County *Hygate* was, whether *Middleſex* being in the margent aides this or not, 203

Indictment for murder,—*dans eidem —— unam plagam mortalem*, not ſhewing any certain time when the blow was given, and that *languebat à* 12. *die Februarii uſque* 13. *diem Februarii*, and ſo both the dayes inclusive, and no day laid at all of his death, *quo quidem* 13. *die Februarii inter horas quartam, et quintam, obiit* ——whether this indictment be good or not, for this incertainty of the hour, with the difference between Indictments and Appeals, upon the Statute of *Glouceſter* 6. *E.* 1. *cap.* 9. and no place ſhewed, where the ſtroke was given, whether he ſhould have ſaid in the concluſion, and ſo he killed him, *modo et forma prout* or not, *fo.* 203

Indictment of murder, gave him *unam plagam mortalem*, and no place named where the ſtroke was given, *et quod eo ictu inſtanter obiit*——no time, when, nor length, nor breadth of the wounds, whether this indictment be good, or not, *fo.* 203, 204

Indictment for a Reſcous, with *vi et armis*, whether good, or not, *fo.* 204

An Indictment upon a preſentment for a Nuſans, laid to be in *via regia*, not ſhewing where the place is, nor in what County, whether good or not, *fo.* 205

Whether an Infant bringinga writ of error, to reverſe a judgement given againſt him in an action of debt, becauſe he then was, and ſtill is an Infant, whether in this caſe, he is to be inſpected by the Court, as in caſe of error by him brought, to reverſe a fine or not, and what the Court is to do in this caſe, as concerning the Plantiff in the action of debt, *fo.* 206

An Indictment upon the Statute of 8. *H.* 6. *cap.* 9. for a forcible entrie, the Statute miſ-recited, being that the fine was thereby given, *domino regi*, and the indictment was *dicto domino regi*, whether this be a good indictment with this variance in it, or not, *fo.* 218

K

THe King cannot take, but by matter of record, *fo.* 33, 34

The King the original of all Franchiſes, *fo.* 55, 56

Whether Kings, in antient times, did uſe to put ſeals to their grants, and with a certain date, or not, *fo.* 195

Whether *Stephen* during the life of *Mawde* his mother was, or could be King, and whether he was not King by uſurpation, *fo.* 195, 196

Whether the King may create a mannor, of another to be an Honour, or a chaſe, to be a Forreſt, or not, *fo.* 196

Whether the King may create an Honour, without an Act of Parliament for it, or not, *fo.* 196

Where the Kings grants ſhall be good without ſpecial recitals of the eſtate of the King, and where not, with the difference

difference where the matters granted do operate by way of discharge, and where to raise a charge upon the Demesnes in his hands whether this be good without a speciall recitall, or not, *fo.*196

L

A Lease made to Husband and Wife, the remainder for 41. years to the survivor of them, neither of them can say certainly which of them shall have this lease in remainder, it being uncertain which of them shall survive, *fo.*62

A man seised of a Mannor, and Tenenement in fee simple, and also possessed of a lease for years in the Ville of Dale, whether by a grant in these words, give, grant, bargaine, sell, enfeoffe, and confirm the Mannor, Tenements, and all other the Lands and Tenements hee hath in the Ville of Dale, whether the lease for years doth passe, or not, *fo.* 99, 100, and 101

Touching London, and the custome of London, for stopping up of the antient lights of another. *fo.*115,116. and the pleading of the same where good, where not, 115,116

A Lease made by a Corporation to try a Title how the same is to be done by them, and executed by their Atturney, by letters Atturney, *fo.*119,120

A Lease made to one for the life of I. S. & afterwards the same lease is confirmed to him for his own life, whether this be now good to him for his own life, & whether his own life shall not be greater to him, then the life of another, fo. 136

If a lease be made to one for his own life, and the same afterwards confirmed to him for the life of another, whether this be a good confirmation, or not, *fo.*136

Where a lease is made to begin a *die datus*, and where it is a *datu*, where the day shall be taken exclusive, and where not with the difference, where an intereſt is to passe, and where not, but matter of accounts, and that by deed dated, *à die datus* or *à datu*, *fo.*177

Touching *London*, and the custome of *London*, in case a Horse at an Inne eats more then he is worth, the same to be praised by his next neighbour, and sold for payment of the money, whether a good custome, *fo.*107

M

MOrgaged goods, not redeemed, not to be forfeited by outlawry, fo.29

Touching a Mannor, the severall kinds, a Nominall Mannor, and in reputation where one Mannor may be held of another, by what name a Mannor may be obtained, and by what not, where by the name of Land, and of a Knights Fee, and by the name of acres of Land, *fo.* 54, 55, 56, 57, 58. and there where one Mannor may be parcell of another, *fo.* 54, 55, 56, 57, 58. and whether a Coppyholde Mannor may be a Mannor, *fo.*55,56. & whether one Mannor may have two Court Barons, *fo.*55,56

What a Tenant at Will of a Mannor may do, and what not, *fo.*55,56,

Whether a customary mannor may be held by Copy, *fo.*56

A Mannor not to be made at this day, *fo.*56

What Fact shall be said to be murder, and what manslaughter, *fo.*86,97

The severall kinds of Manslaughter, *fo.* 86.87

Where upon a challenge sent and accepted of, and one of the parties killed, where this shall be murder, and where not, *fo.*86,87

Where malice apparant shall make murder upon the sudden stabbing of another, *fo.* 86. and where malice implyed shall make the fact of killing to be murder, as the killing of a publike Officer, *fo.*87

Stabbing made murder by the Stat. of 1. Jac. cap. 8. this was murder at the Common Law before, *fo.*87

Murder by poysoning by the Stat. of 1. Jac. cap. 12. all wilfull killing taken as wilfull murder, and so of malice prepensed, *fo.*87

Whether a *moderata misericordia* may be had, for the unreasonablenesse of a fine being affirmed, or not, *fo.*125

Whether the word *murdravit* in an Indictment

Indictment may ſtand for manſlaughter or not, and where it may be ſo taken (being without *ex malitia ſua præcogitata*) and where not, *fo.* 143, 144

Touching Miſnomer, and the pleading of it, whether it may be pleaded after imparlance, or after judgement, or not, *fo.* 184

Touching the Mannor of *Petworth*, and whether the ſame is held of the Honour of *Petworth* or not; and how the ſame is held, *fo.* 194, 195, 196, 197

Touching the Court of Marſhalſie, the dignitie, and antiquity of the ſame, of what matters, and how they are to hold plea, and in what not, and touching the ſeveral Statutes concerning the Court of Marſhalſie, and how they are to be bounded, and within what limits, *fo.* 207, 208, 209, 210, 211, 212, 213, 214. with difference there between the Court of the Marſhalſie, and the Court of Kings Bench.

The Court of Marſhalſie, a Court by preſcription *fo.* 208

The Court of Marſhalſie inferiour to the Kings Bench, the Common Pleas, and the Exchequer, *fo.* 209

The Court of Marſhalſie is a bounded Court, *fo.* 210

Notice, how far, to be taken by ſtrangers of a private by Law, or ordinance made by a corporation, *fo.* 11, 12

Where notice upon a promiſe is to be given, and where not, with the difference, where the thing to be done is executed, and where executory, *fo.* 12. 13

Where notice, is the ground of the action, there notice is to be given, but where the thing to be done reſts in the equal knowledge of the parties, there no notice to be given, *fo.* 12

Where a penaltie is to be recovered, there no notice, but otherwiſe where damages are only to be recovered, with the difference where notice is no part of the promiſe, but a conſequent, *fo.* 12, 13

Where notice is to be laid in the Declaration by the Plantiff, and where not, in an action upon the caſe, upon a promiſe to pay money to the Plantiff, at his return from *London*, with this difference, when it reſts upon a matter to be done, between the parties themſelves, and where it is to be done by a ſtranger, *fo.* 44

Where notice is to be given unto a priſoner, upon the filing of a Declaration againſt him, of the whole proceedings againſt him, before judgement entred againſt him upon a *nihil dicit*, that he may retain an Attorney, or have a Copie of the Declaration, and what the rule of the Court is in ſuch a caſe, *fo.* 186

Whether a Plantiffe may be Nonſuited after a confeſſion of part of the debt, and a judgement for this, and a wager of Law for the reſidue, when the Defendant comes to wage his Law, whether the Plantiffe may be Nonſuited, as to this, or not, *fo.* 194

O

THe office of a Parker, and what ſhall be ſaid to be an exerciſing of his office, and what not, *fo.* 8

An offence to be examined after the death of the partie, where it may be, and where not, *fo.* 14

Touching offices found for the King by the Eſcheator, where the ſame is, *virtute brevis*, and where *ex officio*, *virtute officii*, without writ, and the difference, and as touching the poſſeſſion of the King thereby, *fo.* 34

Who ſhall be ſaid to be an Officer to the Court, for to retorn writs, whether the old Sheriffe, or the new, and to what purpoſes the old Sheriffe, remains an officer, to make retorns after a new Sheriffe choſen, *fo.* 70 and how far the new Sheriffe is an officer to make retorns, before delivery of the priſoners, by the old Sheriff unto him, *fo.* 70. and whether after a new Sheriff choſen, the old Sheriffe, remains any officer to the Court or not, as to the making of any retorns, *fo.* 70. and in what caſes a proces may be awarded to the old Sheriffe, *fo.* 70 and in what not, the old Sheriffe remains an officer to the Court, till he be diſcharged by a writ, *de exoneratione officii*, *fo.* 72, and where a *Di-*

*ſtringas*

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What ſhall be a good ſeiſin of Pannage, *fo.*7,9

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Conſtruction of Letters Patents, and of recitals in them, and where for a miſrecitall, a Patent ſhall be void, and where not, and where void for a miſinformation, *fo.*8,10

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The Stat. of 13. *Eliz. cap.* 8. pleaded for to avoid payment of a debt due by Bond for uſury, *fo.*17

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Where a Coppyholder preſcribes to have common in the ſoile of *I. S.* and where in the Waſte of the Lord, and how the preſcription is to be, and where he may preſcribe, with a *uſitatum fuit*, *fo.*19

A Preſcription, *in alieno ſolo, non in proprio ſolo*, where good, and in what manner a Termor may preſcribe, *fo.*19

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A Prohibition to the Court of Requeſts for injoyning of a Creditor to give a time to his Debtor to pay his debt upon ſecurity given, *fo.*20

Priority of ſuite in the Court of Requeſts, and in the Kings Bench, the difference between them; as to the granting of a Prohibition, which the Court of Kings Bench may do, upon cauſe, though priority of ſuite there, *fo.*20

What ſhall be ſaid to be a good plea in an Action of Debt brought againſt an Executor or Adminiſtrator,

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Touching grants of Preſentations to Churches in ſeveral kindes made, and when to be taken, *fo.* 27, 28

When a Grantee ſhall have election to preſent, and when not, *fo.* 27, 28

Touching pawns, and pledges, and tenders, by way of redemption, when, and to whom, the ſame is to be made, and where a refuſal is, of the money tendered, what is wrought by this, and who is to redeem the ſame, *fo.* 29, 30, 31

A man pledges goods, and is attainted of Felony, the King not to have the goods, without paying of the money, after the goods pledged in whom is then the propertie, *fo.* 29

A man pledges goods, and after he is outlawed, during the outlawry, he cannot redeem them, *fo.* 29

A pledge bailed to a third perſon, no intereſt by this paſſeth to the bailee, *fo.* 30

Goods pledged, the partie to whom, before redemption, bails the goods over, makes his executor and dies, whether the tender is to be made to the Executor, or to the Bailee, *fo.* 30, 31

A man pledges goods, being *bona peritura*, the goods periſh, the money tendered, who to bear the loſs, *fo.* 30, 31

A man pledges goods, tenders the money to redeem them, which is refuſed, the debt ſtill remains a debt, for the which an action lieth, as in caſe of a bond, *fo.* 31

Acceptance of a feofment in performance of a promiſe, after a breach, and before the action brought, whether this be a good plea, in diſcharge of the action being made, and ſo accepted of in full ſatisfaction, and diſcharge of the promiſe, *fo.* 38, 39

In an action upon the caſe, upon a promiſe to pay ſo much for a Cure of the falling ſickneſs, Defendant pleads, that at the time of the promiſe, he was within age, no good plea, being as neceſſary for him, as his meat, and apparel, *fo.* 39

Debt againſt the father, upon an apprentiſes bond, conditioned, that his ſon being the apprentice, ſhould make his Maſter a juſt account without imbezling, and if he did not upon proof made, he would pay the ſame within 3. moneths after demand; Defendant pleaded, that he had imbezled nothing, no proof made, nor any notice, or demand, whether a good plea, what manner of proof to be made, how, and when, *fo.* 40, 41

Lands given to two, provided that one of them ſhall not take any of the profits, a void proviſo, and repugnant, *fo.* 42

The poſſeſſion of a termor, is the poſſeſſion of him in the remainder, *fo.* 42

Whether a *poſſeſſio fratris* may be of a Coppihold eſtate, *fo.* 42

Where a general plea of performance ſhall be void for incertainty, for not ſhewing, what he had paid, nor when, *fo.* 43

A man deviſeth 7. l. to his ſon, makes his wife Executrix, and dies, ſhe takes a ſecond husband, who upon forberance of ſuit, doth promiſe to pay the Legacie, in an action for this brought, the Defendant pleads, that his wife was dead before the promiſe, whether this be a good plea, to free the Defendant, *fo.* 44, 45

Whether a pariſh may be in a Town, or a Town in a pariſh, *fo.* 60 whether a pariſh may be of a place, and of a Town, or not, a pariſh, *eſt locus, ſed non villa*, *fo.* 60, 61, in *Cornwal*, 20. Towns in one pariſh, *fo.* 60

In debt upon a bond, conditioned to pay money to the Plantiffe, on the birth day of the firſt child of the Obligee, ſets forth, that the childe was born, and the money not paid, the Defendant pleads in Bar, that before the birth of the childe, the Plantiffe accepted of the Defendant one Load of Lime, in full ſatisfaction of the ſaid debt, and in full diſcharge *dictæ ſcriptæ Obligationis*, whether this be a good plea in Bar or not, *fo* 66, 67

A Prohibition to ſtay a ſuit in the ſpiritual Court, where the Parſon ſued one of his pariſh for hindering of him in his way, in carriage of his Tithes, with the difference where the right of the way is in queſtion, and where not,

but is interrupted, in the way ſet out for him, and whether in ſuch a caſe he may ſue in the ſpiritual Court, upon the *Statute* of 2. *E.* 6. *cap.* 13. or not, *fo.* 67,68

Touching pledges, and the finding of Pledges, and being omitted, whether the partie may at any time, and in Court enter Pledges, and whether Pledges may be found, after the Bill abated, with the difference where the partie comes in as in *cuſtodia Mareſcalli*, and where it is in an Original action, or writ, that the entring of pledges is in the diſcretion of the Court, and whether the ſame be matter of form, or not, *fo.* 74, 75. with the difference between a Bill, and a writ, *fo.* 74. and whether the entring of pledges, may be aſwel done in Court as to the *Sheriffe*, *fo.* 74. if the partie appears, whether he may not put in Pledges in Court, *fo.* 74,79

A *Pardon* in caſe of murder under the privy, and great ſeal pleaded, and prayed to be allowed of, the which being read, was allowed of by the Court, and the priſoner diſcharged, *fo.* 88

A plea good to a common intent is ſufficient, *fo.* 89. otherwiſe of a Declaration, *fo.* 89

Whether a void preſentment ſhall be made good by a conformation, or not, *fo.* 91

Touching words, and the expoſition of them, as *breve tempus*, and *paululum tempus*, and *tempus conveniens*. *fo.* 91, 92

What pleas may be pleaded before the Juſtices of *Niſi prius*, *pais le darrain* continuance, and what not, and where ſuch pleas are to be pleaded, *fo* 92, 93

How in pleading, a cuſtomary heir in Borrough Engliſh is to intitle himſelf, whether he is in pleading to ſay, *propinquior hæres*, or *Iunior filius*, *fo.* 93

A man preſcribes to have common of Eſtovers, to be ſpent in his houſe, and doth not in pleading aver it for to be *Antiquum meſſuagium*, whether this be good or not, *fo.* 94, 95. and where the houſe is new built, whether to ſhew that the eſtovers were ſpent in the old chimneys, not in the new, *fo.* 94, 95

A Purveyor takes timber Trees, *propter uſum domini regis*, without prayſing of them, which were cut down by the owner, for his own uſe, for which taking the *Purveyor* indicted for felony, upon the *Statute* of 5. *E.* 3. *cap.* 2. whether this be felony, and touching *Purveyors*, what they may do, and what not, *fo.* 96, 97, 98, 99. this being done by a deputy *Purveyor*, what he may do, and what not, *fo.* 96, 97, 98, 99. and in what caſes, and from whence a *Purveyor* may take wood for the King, and whether he may take the ſame, out of a Wood-mongers Wharf or not, *fo.* 97 and whether he may take the ſame, being of the proviſion, of a private man made for himſelf, *fo.* 97. and whether a *Purveyor* may cut down wood growing, or meddle with the freehold of another, *fo.* 97, 98. where a private man cuts down for himſelf wood to ſell, whether a *Purveyor* may take this for the King, *fo.* 97. *Purveyors* cenſured in the *Star* Chamber, for ſelling of Timber without the will of the owner, and been adjudged to loſe their ears for it, *fo.* 98, 99

The Defendant an Adminiſtrator, pleads in Bar to an action of debt, that he hath nothing in his hands, but only to ſatisfie a *Statute*, which was for performance of Covenants, not broken, but kept on foot to defraud Creditors, whether this be a good plea, *fo.* 101

Where a plea by way of juſtification by a factor ſhall be good, and where not having Jewels delivered to him, to Merchandiſe beyond ſea, in an action of account brought againſt him, *fo.* 103, 104, 105. and where the Defendant is to ſwear his plea, and where not, *fo.* 104

Whether an oath taken in the Court of requeſts, in a matter there depending concerning matter of freehold, ſhall bring a man in danger to be puniſhed in the *Star* Chamber for perjury, or not, *fo.* 107, 108

A *Prohibition* to the Councel at *York*, for holding plea, in a replevin, and Avowryes, triable by the common Law, *fo.* 110

A Prohibition to the ſpiritual Court, for proving a will being for Land, and Goods, whether they may prove the ſame there for the goods, or not, *fo.*111

Touching the pleading of the Cuſtome of *London* for ſtopping of the antient lights of another, whether the ſame be good, or not, and in what caſes, 115,116

Touching a Preſcription, to digge the ſoile of an others Land, to faſten ſtakes to dry his nets, being a Fiſherman, whether this be a good preſcription, or not, *fo.*116

A Prohibition to the Spirituall Court for trying the validity of aſſignments of Leaſes belonging properly to the Common Law, *fo.* 125

Touching the Prince who is *natus* Duke of *Cornwall*, but by Charter created Prince of *Wales*, and Earle of *Cheſter*, *fo.*133

A man hath rent in right of his wife, part of it behinde before the Marriage, *dum ſola fuit*, part after, how this is to be pleaded in an Avowry made for this, *fo.*136

The Plaintiff in Action of Covenant for not performance of Articles of agreement, touching the meaſuring of ground to be Demiſed, for breach ſets forth in his Declaration, that the Defendant *non permitteret admeaſurare*, and pleads that (*quoddam ſtagnum*) not ſhewing in what Town the ſame is, there being two Towns, whether this Declaration be good, or not, whether he ſhould have ſaid (*Non permiſit*) *fo.*139

In an Appeale of Manſlaughter, the Defendant pleaded a former conviction before the Juſtices at *Yorke*, that he there prayed his Clergie, and had the ſame allowed him, and pleads over (*Quoad feloniam, & murderum non Culp.* Whether this be a good plea, or not, *fo.*141,142, 143,144

Whether a Priſoner being in execution for debt, and having too much liberty without any reſtraint, whether upon the motion of the party to have him in *arcta cuſtodia*, he ſhall be kept in fetters, and whether a Priſoner ſhall be kept in fetters, being not in priſon, for a criminall offence, or not, *fo.*145 146

Where a pleading of the Kings Letters Patents, by way of juſtification in in treſpaſſe (without pleading *hic in curia prolat.*) ſhall be good, or not, *fo.*154,155

In pleading of Letters Patents, what rules to be obſerved, and upon what differences, and whether to plead the place where made, with the date of it, and where to plead (*hic in curia prolata*) and where not, with the difference where the firſt Patentee aſſigns over his whole intereſt, and where but part, 154,155

In an Action upon the Caſe for a promiſe, being that the Defendant for good conſideration, did promiſe to appear at the next Aſſiſes, and to ſave the Plaintiff harmeleſſe, there from a Recognizance, entred into by him for his appearance, there the Defendant pleads performance by procuring a *Certiorari*, to remove and certifie the Recogniſance, whether this be a good plea, & performance of the promiſe or not, and whether he ought to ſhew the place where the *Certiorari* was delivered, and that it was at the next Aſſiſes, *fo.*155,156

Touching a preſcription and uſage by Coppyholder for life, to cut down Timber-trees on his Coppyhold Land, where the ſame ſhall be good, and where not, and where a preſcription ſhall be ſaid to be againſt reaſon, and ſo void in Law, and where not, *fo.*158

Where a *Procedendo* is to be granted, and where not to proceed in the Court of requeſts, to be relieved againſt an Executor to have a Bond delivered up, the money being paid to the Teſtator, and his promiſe to deliver the Bond, *fo.*158

A Prohibition granted to the Spirituall Court, for medling there with the Precinct of Pariſh Churches, and whether they there may judge what ſhall be ſaid to be a mans Pariſh Church, or not, *fo.*159

A Prohibition to the Spirituall Court for a ſuite there for tithe Herbage for ſaddle Horſes, *fo.*171

What ſhall be ſaid to be a departure in pleading, and what not, and the difference where the pleading doth purſue, and fortifie the former matter, and where not, but new matter, *fo.*176, 177

A Prohibition to the Spirituall Court for queſtioning there the validity of an induction triable at the common Law, whether this be a cauſe of Prohibition, or not, *fo.*179

A Preſcription for every Houſeholder in Dam. to have Common of paſture in an other Ville, whether this be a good preſcription, or not, *fo.*183

Whether Miſnomer may be pleaded after imparlance, or after judgement, or not, *fo.*184

When a Plea pleaded, and entred, may be amended, or a new plea pleaded, and where not, *fo.*186

Where Preſidents and Uſages are to guide a Court, *fo.*188

Prohibition to the high Commiſſion Court. in caſe they hold plea for matter of incontinency, *fo.*188

Where a poſſibility of a Term ſhall be to you, and extinct by the death of the party that had it before it fell, and where not, *fo.*191,192,193,194

A Prohibition to the Spirituall Court, for proving of a Will, there being a Will of Land, and of goods, whether in ſuch a caſe they are to meddle with the probate of it for any part, or not, whether the probate of a Will there for Land, be any evidence to a Jury, or not, *fo.*199,200

What Pleas ſhall be good after the Darraine continuance, and what not, and whether a releas of all Actions and Demands may be there pleaded, or not, *fo.*205

Touching the priviledge of the Kings Bench, by priority of ſuite, one being arreſted by a Latitat upon a Bond of 2000, for 1000. l. for Land ſold, the money in Court before the return of the Writ, an Attachment out of *London*, againſt the party, and arreſted for other debts, whether ſhall now have the priviledge, *fo.*217,& 218

Q

*Quo Warranto*, the Defendant claimed to hold, and keep a Court Baron, having no Mannor, but Nominall, and in reputation, and for what a *Quo warranto* being the Kings Writ, lyeth, and for what not, *fo.*54, 55,56,57,58

*Quo warranto* the Defendant claimed certain Liberties, within the Town of *Petworth*, as the Bailywick, the keeping of a faire and Market there, and the ordering of the Market, and takirig of Toll, of all, &c. with the juſtification thereupon under the Title of the Earl of *Northumberland*, *fo.*194, 195,196, 197

R

Rent reſerved, payable yearly, by equall proportions, at Lady day, and Mich. or within ten dayes after any of the Feaſts, within the Term, whether due on the Feaſt day, or not till the tenth day after, *fo.*1

Rent reſerved payable out of the Term, is no rent, *fo.*1

Rent reſerved, remains a duty, after the Leaſe ended where it is reſerved payable, at the Feaſt dayes, or within ten dayes after, *fo.*1

That ſuch a Rent is due at the Feaſt day, and the ten dayes are only liberty given for the benefit of the Leſſee, *fo.*1.

That ſuch a rent thus reſerved, is demandable on the laſt day, for the laſt payment, the Leſſee is not to have the the 10. dayes, the ſame being out of the Term, *fo.*1

Touching the reparations of the Mother Church, where a Chappell of eaſe ſhall be taxed, and where not, *fo.*16,17

Touching the reparations of a Church, what lands to be charged, and how, and what perſons, *fo.*20

How far a man is to be charged for reparations of the Church, & how far for the ornaments, & in what regard, *fo.*20.

Touching

Touching Relations, and the force of them, and when, and how far, a grant ſhall be made good by Relation, *fo.* 33

To what day, a judgement given in full Term ſhall relate, the ſame to relate to the firſt day, *fo.* 35

Touching returns made by Sheriffs, by the old Sheriffe, after a new one made, what returns ſhall be good, and what not, made by——to him, *fo.* 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79.

Touching returns made, and certified by Commiſſioners, a writ being directed to eight *Nominatim*, and ſeven of them do only certifie, whether this be good or not, *fo.* 105, 106 107

A writ directed to three Coronors, one of them dies before the return, whether the other two may make the retorn, with the difference where the writ, is directed *Coronatoribus* generally, and where it is directed *nominatim* to ſuch, and ſuch Coronors, and one dies before the retorn, where the ſurviving Coronors may make the retorn, and where not, *fo.* 129 *et* 130

Touching Recuſants, and their ſubmitting before conviction, and after relapſing again, and being certified into the Court of Exchequer upon the Statute of 35. *Eliz. cap.* what he is to loſe thereby, *fo.* 133

A woman tenant for life, the remainder in fee, he in the remainder cuts down timber-trees, and ſells them, the woman tenant for life, was informed againſt for Recuſancy, the ſale of the Trees made by the aſſent of tenant for life, the money by the Vendee, was brought into the Court of Exchequer, who ſhall have this money, *fo.* 133

A Recovery in the Common Bench of lands in *Durham*, whether the ſame be good or not, *fo.* 160

A Recogniſance taken for the appearance of one in B. R. before the day he is arreſted, and impriſoned ſo that he cannot appear, whether by this the Recogniſance ſhall be diſcharged or not, *fo.* 170

Whether a writ of Reſtitution may be to reſtore a Conſtable unto his place or not, *fo.* 174

A Releaſe of all actions, and demands where the ſame ſhall diſcharge a debt duty or payment, being not a debt nor duty at the time of the releaſe, and where not, in caſe of an award made the 24th. of *March* for to pay money, at *Michaelmas* following, the Plantiff makes a releaſe the 10th. of *April* following of all actions, and demands (being) ſo awarded to do, till the 10th. of *April*, whether this releaſe ſhall diſcharge the payment to be made by the Defendant at *Mich.* next, or not, *fo.* 178, 179

Touching a Recogniſance, and whether a man may by purchaſe in a Recogniſance or Statute, in what caſes and to what purpoſes he may ſo do, and in what not, *fo.* 188

S

What ſhall be ſaid to be a ſeiſin, where of there may be a diſſeiſin, and what ſhall be a ſufficient ſeiſin for to maintain an Aſſiſe, and where the intent ſhall make a ſufficient ſeiſin, *fo.* 7. 9, 10

The Statute of 13. *Eliz. cap.* 8. pleaded in an action of debt, upon a bond to avoid the payment for uſury, *fo.* 17

By the Statute of 32. H. 8. *cap.* 30. touching Jeofailes, Diſcontinuances aided after verdict, *fo.* 25

Tenant in tail of an advowſon, grants the next avoidance, to one, and dies, the iſſue in tail grants the next avoidance, unto the firſt Grantee, whether this be a ſurrender of the firſt grant, and what ſhall be ſaid to be a Surrender, and what not, *fo.* 33

As touching Seiſures, by force of a Commiſſion, out of the Exchequer, what ſhall be wrought by them, and whether a Seiſure grounded upon a void will, ſhall gain any thing to the King, or not, *fo.* 33, 34

Touching the Statute of 32. *H.* 8. *cap.* 36. of fines levied by tenant in tail, *fo.* 33, 34

Whether a Seiſure, by force of a Commiſſion for the King without title, by a falſe office, ſhall prejudice him,

him, that is in poſſeſſion, or not, *fo.* 34

Touching the *Statute* of 32. *H.* 8. *cap.* 21. for the returns of *Trinity* Term, *fo.* 35

Touching the *Statutes* of 37. H. 8 *cap.* 9. and of 13. *Eliz.* 2. *cap.* 8 againſt uſury, and what ſhall be ſaid to be a uſurious contract within theſe *Statutes*, and what not, *fo.* 36, 37

Touching the *Statute* of 31. *Eliz.* *cap.* 7. touching Cottages, a Coppiholder erecting a Cottage, without laying of four acres of freehold land to the ſame, whether a Coppiholder be within this, and who ſhall be ſaid to be within this *Statute*, and who not, and what ſhall be ſaid to be an erection within this *Statute*, and what not, *fo.* 50, 51, 52

Touching the *Statute* of 34. *H.* 8. *cap.* 5. a deviſe is to be made to ſome perſon, or perſons, *fo.* 62

Touching the *Statute* of 2. *E.* 6. *cap.* 13. that a perſon being diſturbed, ſtopped, or hindered in the carrying of his Tithes, ſo that the Tithe comes to be loſt, hurt, or impaired, whether he may ſue in the ſpiritual Court for his remedie, and in what caſes for ſuch a matter, he may ſue there, and in what not, *fo.* 67,68

Touching the Statute of *York*, 12. *E.* 2. *cap.* 5. that the Sheriffe is to put his name to every return made by him, or the return to be void, *fo.* 73

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where the promiſe in an Action upon the caſe is traverſable, *fo.*15

In a Triall in a *Quare impedit* upon a grant by the Biſhop of *London*, made at *Fullam*, of the next avoidance to a Church of his preſentation, in the County of *Wigorn*, upon an iſſue taken, *quod non conceſſit*, where the tryall is to be, whether in *London* where the grant was made, or in the Countie of *Wigorne* where the Church was, *fo.*47

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Where for want of a Traverſe, a Replication ſhall be had in a Replevin, *fo.*48

A Trover and converſion grounded upon a diſceit, where there was A. B. and C. A. was indebted unto C. and B. unto A. agreed, that B. in diſcharge of his debt unto A. ſhould diſcharge the debt of A. unto C. in paying, and delivering to him certain commodities he then had in his hands, being the goods of A. and which B. did promiſe to deliver to C. in diſcharge of the Debt of A. and C. contented to accept thereof. B. did not perform his promiſe, but converted the goods to his own uſe, A. dyes, C. brought a Trover and Converſion upon this deceit, whether it doth lye or not, and what ſhalbe there ſaid to be a converſion, what not, and whether his not delivery of theſe goods amount vno a converſion, & whether A. or C. both or either of them may have this Action againſt B. 68,69

Trover and converſion for three Munkeys, and divers Muskats, and doth not lay them to be reclaimed, as in caſe of Hawks, whether this be good, or not, *fo.*95

A man puts coals into my Boat, or Corn into my Cart, or a Saddle on my Horſe, whether I may take away my Boat, with the Coals, or my Cart with the Corn, and my horſe with the ſaddle, and may Juſtifie the deteyner of theſe untill replevied, without being lyable to an Action of Treſpaſſe, or not, *fo.*96

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Where the tryall of age ſhall be by inſpection of the judges, and where by *pais*, *fo.*130,131,132

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A Trover and converſion againſt an Innekeeper for a horſe brought by the true owner, the horſe being there left by a ſtranger, *fo.*107

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Where a command of one for to diſtrain Cattell dammage Feſant ſhall be good, and where not in a Re-

a replevin with the difference where a leaſe at will, and where a leaſe for years, or for life is made to the partie that takes the traverſe, and where the ſeiſin, and not the command is traverſable, *fo.* 189

Touching Tenures, and whether a Tenure of an Honour by preſcription may be held of a common perſon, or not, *fo.* 196

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In a Trover, and converſion what place is to be expreſſed in the Declaration, *fo.* 206

What Treſpaſſes are to be *vi et armis*, and what not, *fo.* 210

Touching a Traverſe, and what ſhall be ſaid a good Traverſe, what not, and whether matter of conveyance to the title of the Plantiff, be traverſable or not, *fo.* 214

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What ſhall be ſaid to be a uſurious contract, and what not, money borrowed for a year, and the intereſt paid within the year, not uſury, within the *Statute*, *fo.* 17

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A Verdict aides all diſcontinuances, *fo.* 25

Touching the ſeveral voydances of a Church, *fo.* 27

Touching a uſurpation, what ſhall be ſaid to be a uſurpation, and what not, a uſurpation made upon the King, ſix moneths paſſes, *quid operatur*, *fo.* 32, 33, 34

A man borrowes 100. l. and for this gives bond, conditioned to pay him 20. l. a year, for three lives, by way of Annuity, and no proviſion at all made for repayment of the 100 l. this is no uſurious contract within the *Statutes* made againſt uſury of—37. *H.* 8. *cap.* 9. and of 13. *Eliz. cap.* 8. otherwiſe if there had been any proviſion made, for the repayment of the 100. l. within any certain time, *fo.* 36, 37

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A Verdict given for greater damages, then the Plantiffe Counts upon, *quid operatur* by this, *fo.* 49

Touching the awarding, and miſawarding of a *venire facias*, and of what place the ſame is to be awarded, when of the Town, and when of the pariſh, and whether a *venire facias* may of an Adjective, or not, and where the *venire facias* ſhall be *de manerio*, and where not, the payment to be at the ſouth-porch door of the pariſh Church of *Hauck-Hucknol*, the *venire facias* —— *de vicineto de Hauck-Hucknol*, whether this be well awarded or not, *fo.* 59, 60, 61

A *venire facias*, may be well awarded from a pariſh, but not of a City, nor of a Forreſt, a payment to be made in the Temple Church, the *venire facias* to be *de parochia de St. Dunſtans*, where the ſame is to be of a Caſtle, *fo.* 59, 60, 61. where the *venire facias* ſhall be of the pariſh, and where of the Town, with the difference, where the pariſh, and where the Town is, firſt named, and whether in pleading it be not beſt to name the Town firſt, *fo.* 60, 61

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Where the pariſh is named by way of denotation or explanation, where the place lieth, where the money is to be paid, the *venire facias* there to be of the Town, *fo.* 61

Money by the condition of a bond, was to be paid in *porticu Capellæ de Middleton*. iſſue upon *Non ſoluit venire facias de Middleton*, whether well awarded, *fo.* 67

What ſhall be ſaid to be a good verdict found by a jury, in caſe of an indictment for murder, and what not, *fo.* 87, 88

Whether a preſentment by a contrary name of foundation with admiſſion, inſtitution, and induction thereupon, and that ſeveral times, ſhall make a uſurpation, and gain a Patronage or not, *fo.* 91. upon a void preſentment, by way of uſurpation, who ſhall be ſaid to be the uſurper, *fo.* 91

In an action upon the caſe, the wrong laid to be in divers Places in three *Nominatim*, the *venire facias* awarded of all the three Villes, whether this be good or not. *fo.* 120

As touching the awarding of a *venire facias*, where well, and where not, converſion laid, and *civitatem Coventriæ*, the *venire facias de civitate Coventriæ*, whether this be well awarded or not, and of what place; it is moſt proper for the *venire facias* to be of, *fo.* 126, 127, 128, 129

Whether a vitious *venire facias* be aided by any Statute of Jeofailes, or not, 130, 131, 132

Where a verdict is to finde, that which cannot be pleaded, and where not, as a Collateral warranty, *fo.* 165, 166

Touching a verdict given by the Jury, whether the verdict may be taken in part, and waived in part, or not, and whether the verdict ought not to be entire, *fo.* 197

Whether a uſage to have a *capias* for the firſt proces, contrary to the rules of the Common Law, and to the courſe of the Court, be good, or not, *fo.* 205

What ſhall be ſaid to be a variance, and what not, *fo.* 216

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A Gene ra Warranty implied by the word *dedi*, but *dedi pro me, et hæredibus meis*, is a ſpecial warranty, *fo.* 3

Where general words, in an Indenture, ſhall be qualified by the ſubſequent words of Covenant, and where not, and upon what difference, *fo.* 3, 4

Waiver of an eſtate by an Executor, to avoid payment of rent, *fo.* 23

Words ſpoken of one, being a Juſtice of peace, you out of malice, and ſpleen, have perverted Juſtice, and wreſted the Law, many times, for to ſerve your own turn, whether actionable or not, *fo.* 36

Words ſpoken of the Plantiffe, Thief, murderer, Blood-ſucker, villain, Rogue, and Bankrupt, ſome of the words actionable, others not, damages entire given, whether they ſhall be given for the words actionable only, or not, *fo.* 37

Words ſpoken of the Plantiffe, thou wert forſworn, and I ca prove thee forſworn when I will, whether actionable or not, *fo.* 40

Words ſpoken of the Plantiffe, a beggarly gentleman, and a Banckrupt, the Plantiffe laying, that he uſed the trade of a Graſier, whether actionable, *fo.* 40

Touching

Touching the conſtruction of a will, a man having three ſons, and lands in threee Counties, in fee ſimple, makes his will, and by this deviſeth one parcel of his land in one County, to his eldeſt ſon, another parcel in another County to his ſecond ſon, another parcel in the third County, to his third ſon, and expreſſeth his will to be, that if any of his ſons do die, that then the one of them, to be heir unto the other, the father dies, the eldeſt ſon dies, having iſſue a ſon, whether his ſon, being his heir, or his two brothers, being Uncles to the ſon, ſhall have this land, *fo.* 61, 62, 63, 64

In a Debt for money won at play, Defendant wages his Law, whether he may at the day, without the aſſent of the Plantiffe waive his ley gager, and to have it tried by the *C*ountrey, or not, *fo.* 186

Where in a will, one word in ſeveral, ſhall make ſeveral eſtates, to ſeveral reſpects, and where words in a will, ſhall be taken as words of limitation, and where not, *fo.* 62. a deviſe by will to one, and to his children, what eſtate this ſhall be, with the difference, where he hath children at the time, and where not, *fo.* 62

The intent of a will to be taken according to the intent, and meaning of the Teſtator, where the ſame appears not by expreſs words, *fo.* 62

A man hath two ſons named John, by will deviſeth land to John his ſon, a void deviſe for the incertainty in it, *fo.* 62

Where a will ſhall be void for repugnancy in it, *fo.* 63

When the intent of the Teſtator in his will, doth not agree with the rules of Law, this intent is void, *fo.* 63

Words ſpoken by the Defendant. to the Plantiffe himſelf, thou art a perjured fellow, thou hadſt 10. l. to take a falſe oath, and thou art therefore a forſworn fellow, whether theſe words are actionable or not, *fo.* 69

Words ſpoken by the Defendant to the Plantiffe, thou haſt hoiſtered Thieves, and ſtolen goods, the goods were found in your houſe, the Thieves had before a juſtice, and hanged, and if the juſtice had not been your friend, it had been hard with you, whether theſe words are actionable, *fo.* 109

Words ſpoken to the Plantiffe, thou art a knave, and a Raſcal, for thou ſetteſt upon me in the high way, and there thou tookeſt away my purſe, and my money from me, whether theſe words be actionable, or not, *fo.* 112

Words of the Plantiffe, thou art laid of the Pox, whether actionable, *fo.* 112

A man by his will deviſeth land, unto *William* and *John*, his ſons to be equally and indifferently divided between them, at their own proper coſts and charges, what eſtate have the ſons by this will, and what conſtruction to be made of wills, whether they are joynt-tenants, or tenants in common, *fo.* 113

Touching the conſtruction of a will, a man having lands in *Kent*, and two ſeveral moities, by ſeveral purchaſes, one of them in *Eſſex*, the other in *Kent*, deviſeth his houſe to his wife, and as to my moities, I deviſe all my moities in *Kent* unto *Thomas Bearblock* my ſon in Law, not naming his moitie in *Eſſex*, whether by theſe words both moities paſs or not, *fo.* 117

Touching the certainties to be in a writ contained, that the ſame ought to be certain, and where a writ ſhall be good, and where not, the writ to be as certain as the Court, and where variance is in the writ, as *Amia pro Anna*, and *ad valentiam*, for *pretii*, *fo.* 127, 128

Words ſpoken of the Plaintiff being laid to be a Merchant, the Plaintiff is a Bankrupt, whether theſe words are actionable, or not, he appearing to be an alien born, and a merchant ſtranger, whether he may have this Action, or not, *fo.*134,135

Words ſpoken of an Atturney, that he was well known to be a corrupt man, and to deal corruptly, whether actionable, *fo.*134

A Leaſe made to one for life, without impeachment of waſte, the ſame confirmed to him for his own life, whether he ſhall now be puniſhed for waſte, *fo.*136

Words ſpoken of the Plaintif (he is not worthy to bear Office in ſuch a place, for he keeps a bawdy houſe in *London*——whether actionable or not, *fo.*138

Words ſpoken of the Plaintiſs. My Maſter was robbed of 40. l. and of ſo much plate, and that *Long* and *King* have the ſame, and for which they will be hanged, whether theſe words are actionable, or nor, *fo.*147

Words ſpoken to the Plaintiff, you have ſpoken words which I think are treaſon, and went to a Juſtice, and informed againſt him, who bound him over to the aſſiſes to anſwer the ſame, and bound the Defendant a Miniſter to proſecute, which he did, and the Plaintiff acquitted by verdict, and brought his Action for ſpeaking the words, whether theſe words be actionable or not. The firſt words ſpoken were theſe, occaſioned upon ſpeech of the benevolence, whereupon the Plaintiff ſaid, (I care not for the King, nor yet for his benevolence, whether theſe were treaſonable words, and upon what grounds ſhall be Actionable, and what not, *fo.*147,148,149

Words of the Plaintiff, Thou art a concealer of Felony, and it lyeth in my power to hang thee, whether actionable, or not, *fo.*148

Words of the Plaintiff, I will hang thee, for thou haſt ſpoken words which are high treaſon, whether actionable, or not, *fo.*148

I will hang thee, for thou haſt committed felony, whether theſe words actionable, *fo.*148

Where a Writ of conſpiracy lyeth, and where not, *fo.*151

Touching the conſtruction of a Will, a man deviſes certain leaſes to his eldeſt ſon, (except 140. l. to be paid out of it for portions for his daughters, makes his eldeſt ſon his Executor, and dies, the Sonne makes his Executor, and dies before payment of this money to the Daughters, what remedy the Daughters have for this money as a Legacy againſt the Executor of an Executor, and where to ſue for it, *fo.*153,154

Touching a Warranty, and the diſcent of the ſame, and how far the ſame ſhall be a barre to a remainder man, the ſame diſcending upon him, and how far not, *fo.*162,163,164,165, 166,167

Touching a Warranty, which diſcends upon a remainder man in taile, where the ſame ſhall be a bar to him, and where not, and touching the nature of a warranty, *fo.*162,163, 164,165,166,167.

Whether a Warranty ſhall enlarge an eſtate, or not, and how far a warranty ſhall ſerve to ſtrengthen an eſtate, *fo.*164,165

Which way a man is to have benefit by warranty, whether by way of Voucher, or which way, or by Rebutter, and where he cannot plead a Collaterall warranty, whether the ſame may be given in evidence to a Jury, & they to find it, but where he may plead it, and doth not, whether by his Laches he loſeth the benefit thereof, with the difference between a reall Action, where he may plead the ſame, and a perſonall Action, where he cannot, whether there, it be not ſaved to him, to give the ſame in evidence, *fo.*166,167

Words ſpoken of a High Sherif, he hath couſened the Earl of *Hartford*, of as much as he (the Plaintif is worth, whether actionable, or not, *fo.*172,173

Words ſpoken of the Plaintiff, thou art a Thief, for thou haſt ſtollen my ſheaf of Corn, whether actionable or not, and what words ſhall be ſaid to be actionable, thou haſt ſtollen two buſhels of my apples, or two armfulls of my wood, whether actionable, or not,

not, *fo.*173

Touching the expoſition, and conſtruction of words levied, or to be levied, taxed, aſſeſſed, *fo.*174,175

Where words ſhall be taken according to the Vulgar and uſuall ſence, and manner of ſpeech in thoſe places, where the words are ſpoken, and where not, *fo.*175,176

Words ſpoken of the Plaintiff, that he had harboured, and received his ſonne into his houſe, having notice of him before that he was a Seminary Prieſt, whether actionable or not, *fo.*181

A man by his will deviſeth his term to *Margaret* his Wife, if ſhe live ſo long and continue ſole, and if ſhe dyes within the terme, he deviſeth the reſidue of the years to *John* his Sonne, and to the heirs of his body, makes *Margaret* his ſole Executrix and dyes, ſhe enters and claimes as a legacy, John dyes having iſſue, living his Mother, whether the aſſignee of the Executor of *Margaret*, or the Aſſignee of the Widow of *John*, and her ſecond Husband ſhall have the remainder of this Leaſe, *fo.*191,192,193,194

Whether a wager of Law may be to part of a Debt, and a confeſſion, and Judgement for the reſt, or not, *fo.*194

Whether the party may waive any of the iſſues, in triall, the Jury being ready at the Bar to give up their verdict, or not, and whether there may be a Waiver in ſuch a caſe for the King, or not, and whether ſuch iſſues, for which evidence was given to the Jury, may be waived, or not, for the King, or otherwiſe, *fo.*197

Words ſpoken of the Plaintiff, that he had placed ſuch a woman in ſuch a ones houſe, to the intent to poiſon her, whether actionable, *fo.*201

Whether one produced as a Witneſſe to prove Livery of ſeiſin upon a Feoffement, and having an eſtate at will, in part of the Land, whether he be a good witneſſe, or not to prove the livery and ſeiſin, *fo.*202

Touching the conſtruction of a will, a man by his will doth deviſe ten Acres of Land unto *Robert* his younger ſon *imperpetuum*, and after his deceaſe, the remainder to his Heir Male *imperpetuum*, with divers the like remainders, *proximo filio ſeniori, & hæredi maſculo imperpetuum*, whether by this Deviſe, *Robert* the Deviſee hath an eſtate for life, or in taile, *fo.*219 220,221,222,223

*Scire tuum nihil eſt niſi te ſcire hoc ſciat alter.*

*Deo juvante aſſiſtente & auxiliante hoc tandem perfeci opuſculum. Cui laus, & gloria in æternum.*

# The Author to the Reader.

BY reaſon of my great diſtance from the Preſs, upon ſome publike imployments, during the greateſt time this work was in hand. It could not be avoided, (without making more ſtops in it, ( then was thought convenient) but that many more miſtakes muſt needs eſcape both the Printers, and Correctors obſervation, by reaſon of their unskilfulneſſe in the Law terms, and their unacquaintance with my hand, then would have done, ( had I been neerer.) And indeed, they have not uſed that care and diligence which I expected from them, having faithfully promiſed to rectifie all miſtakes, in the peruſall of the ſheets before they were wrought off. But ſince my return, upon my peruſall of the Book: I find many more miſtakes have hapned, then I could have imagined, there being ſlips in point of Orthography, ſome words miſprinted, many twice printed, and ſome words left out. Thoſe that are of conſequence, and that might alter or obſcure the ſence, ( which are but few) I have particularly preſented in the enſuing Errata. The reſt of them which are but ſmall miſtakes, (though numerous) are likevviſe preſented, both which, an eaſie judgement may *in tranſitu* rectifie, vvhich I deſire the courteous and judicious Reader, to pardon, and correct.

# *Errata.*

FOl. 2 line 19 *plaint*, r. placito, l. 34 r. agreed, f. 5 l. 12 r. recovered, f. 7 l. 44 *Hanwood*, r. Manwood, f. 8 l. 34 r. pars, f. 9 l. 9 r. Park, l. 11 r. predict, f. 12 l ult. r. as to the, f. 14 l. 49 r. preferred, f. 17 l. 35 r. tenement and, r. uſed, l 44 r. ſpecially, l. 41 r. was, f. 18 l. 25 r. in, l. 39 r. this, l. 46 r. hath, l. 54 r. Termor, l. 64 r. pleads, f. 19 l. 24, 25, 27. *Dam.* for Da. *Sam.* for Sa. f. 20 l. 12 r. Injunction, f. 22 l. 5 7 14 r. Certiorare, l. 16 r. was that, l. 22 r. no good, l. 28 r. this in, l. 52 r. for, l. 54 r. judgement is, fo. 23 l. 17 r. hands, in the ſame line omit Juſtice, l. 38 r. is in the, fo. 24 l. 20. r. any, fo. 25 l. 16 r. have no, l. 24 r. Jeofailes, l. 36 r. is now, fo. 26 l. 30 r. affirmetur, fo. 27 l. 17 r. *Ac inſupervoluit*, l. 23 r. ought not to, fo. 28 l. 5 r. *George*, fo 30 l. 14 r. ſo the time, l. 17 r. intereſt, fo. 31 l. 10 r. hath, fo. 32 l. 3 r. who was inſtituted, *and inducted*, and induction there to be omitted, l. 6 r. pur l. 27 r. next avoidance, l 45 r. preſentment, l. 46 r. and induction, fo. 33 l. 37 r. and then, fo. 34 l. 10 r. was, l. 49 r. it is not, l. 52 r. the next avoidance, *and in tail*, for the iſſue in tail, fo. 37 l. 29 r. thief, fo. 38 l. 33 r. is in, fo. 40 l. 25 r. theſe words are, fo. 42 l. 32 r. joyntenants, fo. 43 l. 25 in the Margent *Rot.* omitted, fo. 46 l 29 r. exception, fo. 48 l. 4 r as, in the Margent *had*, for bad, l. 30 r. *del*, fo. 49 l. 36 r. his, l. 45 r. to no, fo. 50 l. 5 r. Aſſeſs, fo. 51 l. ult. r. Coppyholder, fo. 52 l. 10 r. the Statute is general, fo. 53 l. 15 r. is not, fo. 54 l. 15 r. it was, l. 40 r. a fine in the ſame line r. there fo. 55 l. 8 r. 20. s. l. 10 r. cannot have l. 29 r. in chief l. 44 19. 8. for 19. H. 8. fo. 56 l. 18 r. Defendant l. 23 r. *del*, fo. 57 l. 50 r. as where there, fo. 58 l. 13 r. A fo. 59 l. 13 r. *del* l. 35 r. burſted fo. 60 l. 1 r *alicujus* l. 13 r. is ſo l. 18 r. where it is fo. 61 l. 12 r. in this caſe was fo 62 l. 35 r. an eſtate for life l. 40 r. is to a ſon, fo. 63 l. 2 r. this l. 9 r. the other parts l. 18 r. in this caſe fo. 65 l. 20 r. it did not, fo. 66 l. 10 r. Defendant l. 22 *Pinnels* caſe fo 68 l. 24 ( either B. ( B. )to be left out ) fo. 71 l. 12 r. *pluries* l. 23 r. but he was fo. 71 l. laſt but one r. Tauſtologie fo. 72 l. 22 r. *deliberavi* l. 25 this notwithſtanding to be left out l. 45 (error) to be left out l. 50 r. for without this, l. 54 r. not expreſſed, in the ſame l. r. *ad Curiam proximam futuram*, fo. 73 l. 11 r ſuit, l. 22 r. if he was not Sheriffe, l. 29 r. takes the, fo 74 l. 8 r. to be ſo, l. 1. r. *Mandavi*, and l. r. as in this, l. 27 r. *proximo futur.* l. 51 r. the ſame is fo. 77 l. 14 r. No l. is r. in an fo. 78 l. 36 r. delivers, fo. 80 l. 22 r. left l. 35 r. indictment ſo 82 l. 36 r. Count l. 52 r. are fo. 83 l. 12 r. Mayhem l. 11 r ſuch certainty l. 28 r. and couple fo. 85 l. 24 r. have l. 48 r. of the fo. 87 l. 25 r. 1 *Jac* fo 89 l. 39 r. is pleaded fo 90 l. 40 r. of covenant, fo. 91 l. 9 r. *juxta* l. 21 r. patronage, fo. 94 l. 44 r of Eſtovers, fo. 95 l. 4 r. falls down, l 5 r. *Lutterels* caſe, fo. 96 l. 27 r. for theſe, l. 32 r. 4 E 3, l. 28 r. tallying, fo. 97 l 13 r. fell, l 14 r. felled, 16 r. Majeſties, l 18 r. prier, l 42 r. *capit*, & r. *ab cariavit*, fo. 99 l 4 r. is it not, fo. 100 l 44 r. objection, fo. 101 l 15 r. *fuit*, fo 102 l 17 r. uſeth, l 23 r is, l 31 r. ſtranger, l 35 r Eſſoyned, fo. 103 l 24 r adventure, fo. 104 l 31 r anſwer for this, fo. 105 l 42 r Stouſe and Birton, l 45 r. *faux itie*, fo. 116 l 5 r Choke, l 17 r *fuit*, l 42 r. wee, fo. 111 l 36 r. this a, fo. 112 r. *Golley*, fo. 113 l 1 r. horſe, l 25 r. an, l 39 r. by equal, fo. 115 l 31 r. ceſſe, fo. l. laſt r. for both, fo 118 l 6 r. Leſſee, fo 121 l 23 r. at, fo 122 l 47 r. them, fo 123 l 11 r. the Plaintif demurred to the, l 50 r clauſe, fo 125 l 17 r. of aſſignments, fo 126 r. *Clifton*, & r. are *vocabula*, l 37 r. 7 *H* 4 fo. 12. 13. fo 127 l 28 r. miſawarded, l 52 r. bar, fo 128 l 42 r. againſt *Wolfe prædict*, l 43 r. againſt *John Wolfe*, fo 130 l 37 r. *Moreton*, fo 131 l 33 r. that 30, l 29 r. that deniſage, fo 132 l 17 r. nonage, l 20 r. inſiſted upon, fo 133 l 7 r. in this Court, 135 l 13 r. is not a, l 15 r. living the other, l 17 r. one, l 34 r. *durante vita dictæ*, l 36 r. Sur grant, et render, fo 136 l 13 r. for rent due to him and his wife, fo 137 l 34 r. the ſame was due. l 40 r. owe me, l 55 r. for the ſame, l laſt r. in arrear to them both, fo 138 l 36 r. ſome words, fo 140 l 14 r. Dones, l 47 r. to ſtay her ſuit, fo 141 l 5 r. *quoad*, l 16 r. a, l 47 r. doth, l laſt r. 9 H 5 fo 142 l 9 r. *acquietatus*, l 16 r. auterfoits, l 45 r. appriſed, l 16 r. up, fo 144 l 17 r. them on, l. 27 r. and, l 44 r. this is a, fo 146 l 10 r ſhewes, l 15, 16 r he did break, fo 148 l 40 r. here, l 42 r. if he, l 53 r. then this, fo 149 l 34 r. ſo. 15 & ſo in the marg. fo. 150 l 43 r. he demanded then, fo 151 l 56 r. this cozening, l 25 r. fo: 14, fo 152 l 18 r. term, fo 153 l 9 r. but, l 30 r. ſaid, fo 154 l 24 r. for that they, l 43 r for the patentee, l 47 r. patent, fo 156 l 8 r. aſſiſes, fo 158 l 15 r. ſoile, fo 159 l 6 r. had, l 18 r. Dunel, l 30 r. *recuperet*, l 45 r. ſhall not be given, fo 160 l 17 r. a default, l 45 r. *recuperet*, l 51 r. returned, fo 161 l 17 r. a writ, l 12 r. *Vaviſor*, l 28 r. it appeareth, l 34 r. *Penryns*, l 53 r. been, fo 62 l 41 r. ſyne, fo 163 l 10 r. the ſame is gone, l 28 r. but, fo 164 l. 31 r. precedent, l 54 r. the ſame is gone, fo 165 l 7 r. this l 14, 15, r. accordant, fo 166 l 21 r. and aſſignes, l 32 r. next place, l 36 r. he be, fo 171, l 41 r but if it, fo 172, l 32 r. here unto, fo 175 l 8 r. is to, fo 178 l 31 r. Choke, fo 184 l 9 r. as if it. & r. Serle, fo. 188 l 28 r. bought, l 38 r. for if it went, fo 189 l 19 r. in, fo 191 l 12 r. living, fo. 192 l 23 r. life time, fo 192 l. 49 r. ſecondly, fo 195 l 32 r. he muſt draw, fo. 199 l 37 r. here done by, l 39 r. cap. 5. fo. 201. l 28 r. that the, fo 202. l 7 r. the caſe, l 47 r: certainty, fo. 203 l 2 r. *quandam*, fo 205 l 15 r. for his, l. 20 r: revived, to 207 l. 39 r. appears, fo 208 l. 8. r. gueſt, twice, l. 48 r. ne dauter, fo 210 l. 45 r. made, ſo 211 l. 39 r. *juriſdictio*, fo. 213 l. 32. r. the ſtatute, fo. 215 l. 21. r. 2.

*Labor improbus, (dei benedictione) omnia vincit:*
*Deo juvante, nil valet Livor,*
*Deo non juvante, Nil valet labor.*